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PRACTICE SERIES

SUNDERLAND'S CASES ON PROCEDURE

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Appellate Practice.*

Sunderland's Cases on Evidence.

CALLAGHAN & COMPANY
CHICAGO

CASES ON PROCEDURE

ANNOTATED

TRIAL PRACTICE

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CHICAGO
CALLAGHAN AND COMPANY
1912

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CASES ON PROCEDURE.

THE SERIES.

The present volume, on Trial Practice, is the first of a series of case-books which the editor hopes to prepare for the use of law students, covering the broad subject of Procedure. The plan contemplates separate volumes on the following special topics:—Trial Practice, Code Pleading, Common Law Pleading, Equity Pleading and Practice, Criminal Procedure, Evidence, and Appellate Practice.

These books are to be prepared as separate and independent treatments of the subjects to which they relate. Each branch of procedure has its own subject-matter and its independent problems, and no advantage would result from erasing the lines which mark its boundaries. But while this is so, it is nevertheless important to observe that an adequate conception of any one of these branches can be formed only by keeping constantly in mind the scope and function of procedure as a whole. In a very true and fundamental sense procedure is single and indivisible. Its aim is to furnish a mechanism for litigation, to supply a means and method for applying the law in the solution of legal controversies. One purpose runs through it all. Pleadings are drawn to present issues for trial; trials are had to determine issues raised by the pleadings. What the trial demands the pleadings must give. One is the counterpart of the other. Only in view of the trial are the pleadings intelligible; only by reference to the pleadings can the scope and course of the trial be determined. And as for the relation between procedure in *nisi prius* and in appellate courts, the former is moulded to meet the requirements of the latter and the latter is based strictly upon the foundation laid by the former. Thus pleading, in its various forms, trial practice, and appellate practice may be correctly viewed as component parts of a highly developed system designed to enable parties to successfully resort to courts of law for the redress of grievances. Together they furnish a complete mechanism for the administration of the law.

In the present series of case-books upon procedure it is proposed to develop the subject, so far as possible, in this broad and comprehensive way. Each branch will be treated separately, and its technical details will be fully and carefully exhibited, but at the same time it will be the definite aim to make each volume disclose its place and purpose as an integral part of an articulated system. In this way, if at all, may procedure be shown in its true character, as a logically developed and practically efficient means for accomplishing a very important end, instead of a mass of arbitrary and technical rules. No method will work well in the hands of those who lack an adequate perspective and who fail to take a comprehensive view of its scope and purpose. If the law schools are to turn out men able to meet the exacting demands of a critical and sorely-tried public, they must spare no effort to develop in their students a thorough, rational and enlightened appreciation of the true function and the basic principles of procedure. The series here proposed is an effort to supply material to meet this need.

EDSON R. SUNDERLAND.

University of Michigan.

PREFACE.

The teaching of Practice has been neglected to a surprising degree in American law schools. The subject is one of immense importance to the profession, as all lawyers understand. And yet, in fitting men to practice law the schools have seldom accorded it a prominent place in the curriculum. It is probable that in no profession do the technicalities of practice play so large a part as in the law. Indeed, court procedure has really become a public problem in which the laity, who suffer from its abuses, are beginning to take a vigorous and aggressive interest. A subject of such vital concern to both the public and the profession should be worthy of a careful and discriminating study.

For many years the Law Department of the University of Michigan has offered an exceptionally large amount of work in Practice, and this has tended to increase from year to year as the methods have become better systematized. This work has consisted of two branches, classroom work in the principles of Practice and a practical application of these principles in the Practice Court. The former has proved particularly troublesome because there were no suitable books available for classroom use. Various general texts on Practice have been employed, and recently the work has been conducted as a research course, questions being prepared and handed to the students to be answered by reference to the statutes, digests, reports and text-books in the library. But neither the text-book nor the library method proved entirely satisfactory. Each tended to emphasize the rules of practice as such, instead of developing the reasons underlying them. In a law school largely devoted to the case system of instruction, it finally became clear that a case-book in Practice was an urgent necessity. This book has been prepared to meet that need.

A comparative study of the decisions on Practice in the

different States will readily dispose of the commonly accepted fallacy that Practice is primarily a local subject, to be studied and taught as a matter of local education in preparation for admission to a local bar. In truth, the principles of trial practice are largely of general application. The variations found in different jurisdictions are most of them on minor points. The major problems, involving the correlation of functions between judge, jury, attorney, party and witness, are always the same, wherever the jury system is in use. And the solution of these problems of trial practice has followed closely parallel lines in the different American jurisdictions. In every instance there were the same elements to work with, the same results to be reached, and the previous experience of other courts was at the disposal of each. Logic and experiment led along the line of least resistance, and resulted in the building up of a systematic and well-ordered body of principles which, if administered with intelligence and conscience, are, in the main, admirably adapted to meet the requirements of modern courts of justice.

The present volume is intended to develop and disclose the rational basis for the main principles of practice employed in the trial of civil actions at law. Recourse has been had to the whole body of American case law, and the choice of cases has been determined by the clearness with which the court has shown a logical justification for the decision made. By this means it is hoped that the book will help the student to analyze and understand the methods by which courts solve problems of practice, to appreciate the comparative value, importance and bearing of the different elements involved, and to form sound notions of the underlying principles governing the complex field of modern court procedure.

The cases have been very freely edited, and everything not germane to the subject for which the case was chosen has been omitted. Questions of procedure are usually raised in connection with questions relating to the substantive law, so that few opinions can be advantageously used *in toto* in a work of this kind. It is believed, however, that the facts of the various cases have never been

cut so far as to impair their value. The great advantage of cases over text-books as educational instruments lies in the presentation of facts out of which the court, by a logical process of demonstration which it develops and exhibits before the reader, is able to derive its legal conclusions. Cases with facts eliminated are usually of little more value than the abstract discussions of the text-books, and great care has therefore been taken to preserve them in every instance where the legal principles involved depend in any material degree upon the nature of the facts.

While Evidence is essentially a branch of Trial Practice, it has been entirely excluded from the present volume, for the obvious reason that it is everywhere recognized as of sufficient importance and difficulty to warrant an independent treatment.

EDSON R. SUNDERLAND.

University of Michigan,
Ann Arbor,
September, 1912.

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CHAPTER I.

WRITS OF SUMMONS.

SECTION 1. WHAT IS PROCESS.

BROOKS V. NEVADA NICKEL SYNDICATE.

Supreme Court of Nevada, 1898.

24 Nevada, 311.

By the Court, MASSEY, J.:

* * * * *

The first objection made to the validity of the judgment, based upon defects appearing in the judgment roll, is that no summons was ever issued in the action—that the paper purporting to be a summons is void for the reason that it runs in the name of “The People of the State of Nevada.” Section 13, article VI of the constitution requires that the style of all process shall be “The State of Nevada.” Is a summons issued under our law a process within the meaning of the provision of said article?

Under our practice act, which has been in force since 1869, provision is made for the issuance of summons to be signed by the attorney for the plaintiff, or by the clerk, and, when issued by the clerk, requiring that it shall be under the seal of the court. The same act specifically defines the contents of the same. There is nothing in the act requiring the summons to run in any particular form. It has never been treated as a process within the meaning of our constitution either by the legislature or the courts, and, while there is conflict of authority upon a similar question, under constitutions and statutes similar to our own, in other states, we are disposed to hold that a summons is not a process, within the meaning of our constitution.

Upon this point we quote from a decision of the Supreme Court of Colorado, in which it says: “As to the first point raised—that the summons is such a process as may be issued in the name of the people of Colorado—we are strong-

ly inclined to follow the conclusion of the Supreme Court of Florida in *Gilmer v. Bird*, 15 Fla. 411. In this case the identical question here presented is discussed at some length—that is, ‘that the summons, as authorized by the code, is a “process”, within the meaning of the constitutional provisions which require the style of all process to be the “State of Florida”’; that the summons had no such style; that this was essential to the validity of the judgment, there having been no appearance.’ And the court said: ‘But is the notice given by an attorney of the institution of a suit, in a form similar to a summons, but not issuing out of a court, a “process” within the meaning of the constitution? Baron Comyn, in giving the definition of the term “process” says it imports the writs which issue out of any court to bring the party to answer, or for doing execution. There is no definition of “process” given by any accepted authority, which implies that any writ or method by which a suit is commenced is necessarily “process.” A party is entitled to notice and to a hearing under the constitution before he can be affected, but it is nowhere declared or required that that notice shall be only a writ issuing out of a court.’ ” (*Comet Consolidated M. Co. v. Frost*, 25 Pac. (Col.) 506; *Hanna v. Russel*, 12 Minn. 80; *Bailey v. Williams*, 6 Or. 71; *Nichols v. The Plank Road Co.*, 4 G. Greene, 44.)

* * * * *

SECTION 2. DESIGNATION OF COURT AND PARTIES.

EGGLESTON V. WATTAWA.

Supreme Court of Iowa. 1902.

117 Iowa, 676.

Action on a judgment recovered by default in the circuit court of South Dakota in and for Brule county. Defendant demurred on the ground that the summons in the action on which the judgment was recovered was not sufficient to give the court jurisdiction. The trial court sustained this demurrer, and, on plaintiff's election to stand on his

petition, rendered judgment for defendant, from which plaintiff appeals.—*Affirmed.*

McCLAIN, J.—Although the action on which the judgment was rendered in South Dakota was entitled in the circuit court, the summons required defendant “to answer the complaint of N. W. Eggleston, plaintiff, which will be filed in the office of the clerk of the district court within and for said Brule county, at Chamberlain, Brule Co., S. D., and to serve a copy of your answer to the said complaint on the subscriber at the office in the city of Chamberlain, S. D., in said county and state, within thirty days after the service of this summons, exclusive of the day of service, or the plaintiff will apply to the court for the relief demanded in the complaint, besides costs.” This summons was served on January 9, 1892. The complaint on which judgment was rendered by the circuit court of Brule county was not filed until December 9, 1892, and judgment by default was entered on that day. The provisions of the statutes of South Dakota, set out by plaintiff in his petition, provide, with reference to the summons, that it shall require defendant “to answer the complaint and serve a copy of his answer on the person whose name is subscribed to the summons, at a place within the state to be therein specified, in which there is a postoffice, within 30 days after the service of the summons, exclusive of the day of service.” It is evident that under such statutory provision the summons in question was fatally defective in not correctly naming the court in which the complaint would be filed. The statutes of the state do not, so far as made to appear in this record, specifically require that the court in which the defendant is to appear shall be named, but certainly that is essential to such a notice as would be sufficient to constitute due process of law. Moreover, it is required by the statutes of that state, if a copy of the complaint is not served with the summons, that “the summons must state where the complaint is or will be filed.” The summons in question did not state that essential fact, for no complaint was ever filed in the “district court.” There was in fact no such court then in existence, the “district court” as known under the territorial government, having been replaced by the “circuit court” by the provisions of the constitution under which the state was admitted. This change

of courts is pleaded in the case by plaintiff as an excuse for the mistaken description, but the fact remains that defendant was not notified that the complaint would be filed in the circuit court, in which the judgment was rendered, but was advised that it would be filed in another court, which in fact did not exist. Under such circumstances we think defendant was justified in assuming that no valid judgment could be rendered against him. The circuit court acquired no jurisdiction, and the judgment on which this action is based was therefore void. See, as bearing in general on the question, *Lyon v. Vanatta*, 35 Iowa 521. Other questions are argued, but, as they involve the construction of statutes of another state, their decision would be of no advantage to anyone.

The demurrer was rightly sustained, and the judgment is *affirmed*.

LYMAN V. MILTON.

Supreme Court of California. 1872.

44 California, 630.

By the Court, BELCHER, J.:

The plaintiff seeks by this action to enforce the execution of a resulting trust.

The complaint names as defendants, Martha Ellen Milton, administratrix of the estate of Daniel Milton, deceased, Martha Ellen Milton, and Ida May Milton. It alleges the death of Daniel Milton, leaving him surviving as his only heirs at law his widow, Martha Ellen Milton, and his daughter, Ida May Milton, an infant of about the age of three years, and that Martha Ellen Milton had been duly appointed the administratrix of his estate.

Upon the complaint a summons was issued, entitled: "W. Lyman, *plaintiff*, v. M. E. Milton (*administratrix, etc.*) *et al., defendants.*" It was addressed to "M. E. Milton, administratrix *et al., defendants,*" the name of Ida May Milton nowhere appearing in it. This summons was served upon both defendants, and afterwards, upon application of

the plaintiff, the adult defendant was appointed the guardian *ad litem* of the infant defendant. The said Martha Ellen accepted the trust of guardian *ad litem*, and, thereupon, before filing answer, or otherwise appearing, appeared in court by counsel, stating to the court that she appeared on behalf of said infant for the purpose only of moving to quash the summons. The court refused to permit such an appearance, and refused to recognize counsel, or hear anything they might have to say on behalf of the infant, unless they entered an unqualified appearance for the general purpose of defense. Having duly entered an exception to this ruling, counsel then, in obedience thereto, stated without qualification that they appeared on behalf of all the defendants. Thereupon they submitted a written motion on the part of the said infant and her guardian, that the summons be quashed on the ground, among others, that the same is radically defective in not stating the parties to the action. The court overruled this motion and the defendants excepted.

Afterwards, upon answers filed in behalf of each defendant, the case was tried by the court and judgment entered in favor of the plaintiff.

The statute (Practice Act, Sec. 24) provides that "the summons shall state the parties to the action, the Court in which it is brought, the county in which the complaint is filed, the cause and general nature of the action, and require the defendant to appear and answer the complaint within the time mentioned in the next section after the service of the summons, exclusive of the day of service, or that judgment by default will be taken against him according to the prayer of the complaint, briefly stating the sum of money or other relief demanded in the complaint."

It is manifest that the summons in this case did not state the parties to the action. M. E. Milton, in her representative capacity of administratrix, was but one of three parties defendant. The words "et al.," in the connection in which they are used, are of no significance. They indicate, at most that there are still other parties who are not named. Without them, so far as a compliance with the statute is concerned, the summons would have been as complete as with them.

Is a summons, in which one defendant only is named,

when in fact there are several defendants to the action, a good summons to the defendants not named in it? Must one who is served with a summons to which he does not appear to be a party take notice at his peril that he is really a party to the action? To hold so we must hold that the section of the statute referred to is only directory in its requirements. But if it be directory and not mandatory, why may the summons not omit to state the court in which the action is brought, or the county in which the complaint is filed, or the cause and general nature of the action, or the time within which the defendant is required to appear, or the amount of money or other relief demanded in the complaint, or all of them together, and still be held good? All of these things are stated in the complaint, except the time within which the defendant must appear, and that is a matter regulated by law, which every one is presumed to know. If notice only is required, the party has that when he sees a copy of the complaint and himself named in it as a defendant. And yet no one would contend that a summons which omitted to state the several matters required by the statute could be held good.

The summons is the process by which parties defendant are brought into Court, so as to give the Court jurisdiction of their persons. Its form is prescribed by law; and whatever the form may be it must be observed, at least substantially. It may be that a summons under our system is required to state more than is necessary for the information of the defendant; that a copy of the complaint served by the Sheriff or the attorney would have been all that is needful. If that be so it is a matter for the legislature and not for the Courts. We entertain no doubt that a summons must contain all that is required by the statute, whether deemed needful or not, and, among other things, must state the parties to the action.

It may be that when the defendant moved to quash the summons for insufficiency the Court might have entertained a counter motion to have it amended by inserting the omitted names of the defendants, and, on its being so amended, might have denied the original motion.

In *Polack v. Hunt*, 2 Cal. 193, it was held that the court had power to amend the summons so as to make it conform to the law, when it operated no hardship or

surprise to the defendants. No such counter motion, however, was made in this case, and we cannot pass upon that question.

A defendant has a right to appear for the purpose of moving to dismiss a defective summons, and it is error in the Court to refuse him that privilege. Nor does the fact that he afterwards appears and answers waive his right or cure the error. (*Deidesheimer v. Brown*, 8 Cal. 339; *Gray v. Hawes*, id. 569.)

For the error named the judgment must be reversed and cause remanded for further proceedings, and it is so ordered.¹

¹ In *Saddler v. Smith*, (1907) 54 Fla. 671, 45 So. 718, the court said; "Where there are several parties defendant it would not be sufficient to give the name of one defendant in the *body* of the subpoena or copy, followed by the words *et al.* *Lyman v. Milton*, 44 Cal. 630. And so we have held that in a writ of error or appeal, all parties thereto must be named and cannot be included in the words *et al.* * * * While the words *et al.* are incapable of standing in the place of the names of parties required by law to be stated in a subpoena or writ of error, they may be used in endorsing the title of the cause on the copy of subpoena where there is no statute or rule requiring the names of the parties to be indorsed thereon."

SECTION 3. DESIGNATION OF TIME FOR APPEARANCE.

LAWYER LAND COMPANY V. STEEL.

Supreme Court of Washington. 1906.

41 Washington, 411.

HADLEY, J.—

* * * * *

This appeal is from an order quashing a summons and the service thereof. The essential part of the summons reads as follows:

"You and each of you are hereby summoned to appear within twenty days after the service of this summons, exclusive of the day of service, if served within the state of Washington, and within sixty days if served out of the state of Washington, and defend the above entitled action in the court aforesaid, and answer the complaint of the plaintiff and serve a copy of your answer on the

person whose name is subscribed to this summons at Spokane, Spokane county, state of Washington, and in case of your failure so to do, judgment will be rendered against you according to the demand of the complaint which will be filed with the clerk of said court, a copy of which is herewith served upon you.”

The summons and complaint were personally served upon respondents in the state of North Carolina. The affidavit of service is in all respects regular and sufficient. Bal. Code, Section 4879, provides as follows:

“Personal service on the defendant out of the state shall be equivalent to service by publication, and the summons upon the defendant out of the state shall contain the same as personal summons within the state except it shall require the defendant to appear and answer within sixty days after such personal service out of the state.”

It is argued by respondents, and such seems to have been the view of the superior court, that inasmuch as the summons was so drawn that it contemplated that a service might be made either within or without the state, it is fatally defective. It is contended that the duty was upon appellant in advance to determine whether service was to be made within or without the state, and that the summons should have been drawn with reference to one or the other only. It seems to us that the essential inquiry is, Was the summons by its terms confusing or misleading to respondents? We cannot see that it was. It plainly told them that, if they were served without the state, they were required to appear within sixty days. That portion relating to service within the state became mere surplusage in view of the service that was made, and it was so manifestly such that it was in no sense confusing. We therefore think the court erred in quashing the summons and its service. Under the above statute, the service was equivalent to service by publication.

* * * * *

The judgment quashing the summons and service is therefore reversed, and the cause remanded, with instructions to vacate that part of the order appealed from and proceed with the action.¹

¹*Return Day.* In *Clough v. McDonald*, (1877) 18 Kan. 114, the statute required that the summons should be served and returned by the officer with-

in ten days from its date. The summons was in fact made returnable in six days, and was served on the day before the return day. The court said: "Now a summons of this kind we think is never void. It might be voidable however, if the officer should take the whole time (ten days) given him by law within which to serve it upon the defendant, for in that case the time given to the defendant within which to answer or demur would be shortened. But when the officer serves the summons before the return day thereof, as in this case, we do not think that either the summons or the service is either void, or voidable. In such a case the defendant has lost nothing. He has his full twenty days after the return day of the summons within which to answer or demur, and that is all that the law gives him in any case. It is the time of the officer, and not that of the defendant, that is shortened, by making the return of the summons less than ten days from its date."

Where the return day and appearance day are the same, as in some states, the argument just quoted would of course not apply.

See, also, *Morris v. Healy Lumber Co.*, (1903) 33 Wash. 451. 74 Pac. 662.

SECTION 4. DESCRIPTION OF CAUSE OF ACTION.

BEWICK V. MUIR.

Supreme Court of California. 1890.

83 California, 368.

SHARPSTEIN, J. This was an action to foreclose a number of liens upon a mine for labor and materials under the act of 1880. There were forty-five plaintiffs, each claiming a separate lien. Judgment was given for the plaintiffs, and two of the defendants appealed.

1. The summons is sufficient. It states the nature of the action in general terms, and this is all the statute requires. It is apparent from the statements of the summons that the action in which it was issued was to recover money and to foreclose liens. This is the general nature of the action. It is unnecessary to state whether the right to the money sought to be recovered accrued from work and labor, or from goods sold and delivered, or to state the kind of lien, or on what property the lien attached. All these things appear in the complaint on file, of which filing he is notified by the summons, and if he is not notified he is bound in law to know it. He is bound to know that a complaint has been filed; for otherwise a summons could not issue. It makes no difference that a copy of the complaint is not served on the party moving. The above is in accordance with the *dictum* in *Lyman v. Milton*, 44 Cal. 631.

The summons states what the statute requires and all that is needful. The cases decided in *Lyman v. Milton*, *supra*, as also in *Ward v. Ward*, 59 Cal. 141, were different from this, and, as said above, there is a compliance with the *dictum* in the former case and with the statute. Why require that to be inserted in the summons which must appear in the complaint? Our practice is cumbersome enough without its being made more so by judicial decision. We cannot understand how it can be said that the summons does not contain "a statement of the nature of the action in general terms." The Code of Civil Procedure provides (which is equivalent to a command to all of the courts of the state) that all of its provisions are to be liberally construed, with a view to effect its objects and promote justice. (Code Civ. Proc. Sec. 4.) The objects of the requirements of the statute as to what the summons shall contain are carried out by serving it with a general statement which is *specialized* in the complaint, and it is injustice to turn a party out of court or reverse a judgment on a view of the summons *merely technical*, when the summons points to the complaint where the particular statement is made, and if a copy of the complaint is not served on the moving party, he knows where to find it. When the motion was made at the bar of the court, the complaint was no doubt within reach, or it could have been procured in a moment. *King v. Blood*, 41 Cal. 316, is precisely in point, and treats the question as it is here, as a perusal will at once show. The court did right in denying the motion.

* * * * *

[*Reversed on other grounds.*]

SECTION 5. SIGNATURE, TESTE AND SEAL.

LOWE V. MORRIS.

*Supreme Court of Georgia. 1853.**13 Georgia, 147.*

Motion to dismiss writ of error.

* * * * *

LUMPKIN, J., concurring.

Is a writ of error a nullity without a seal?

My first impression was, that this defect was fatal. Upon reflection, my final conclusion is, the other way. * * *

* * * * *

Lord Coke defines a seal to be, wax with an impression, (3 *Inst.* 169.) “*Sigillum*” says he, “*est certa impressa, quia cera sine impressione non est sigillum.*” And this has been adopted as the Common Law definition of a seal. *Perk.* 129, 134, *Bro. tit. Faits.* 17, 30. 2 *Leon.* 21. But it is a curious fact that there is neither an Act of Parliament nor an adjudged case, up to *Lord Coke’s* day, to bind the courts as to what constitutes a seal. His opinion was probably founded on the practice of the country in his day.

New York, and most of the States North, have held that a seal is an impression upon wax, wafer or some other tenacious substance, capable of being impressed. 5 *John. Rep.* 239, 2 *Caine’s Rep.* 262. 21 *Pick. Rep.* 417. But in Pennsylvania, New Jersey, and the Southern and Western States generally, the impression upon wax has been disused, and a circular, oval, or square mark, opposite the name of the signer, is held to have the same effect as a seal, the shape of it being altogether indifferent. It is usually written with a pen, sometimes printed. 2 *Serg. & Rawle*, 503. 1 *Dall.* 63. 1 *Watts*, 322, 2 *Halst.* 272.

The truth is, that this whole subject, like many others, is founded on the usage of the times, and of the country. A scroll is just as good as an impression on wax, wafer, or parchment, by metal, engraved with the arms of a prince, potentate, or private person. Both are now utterly worthless, and the only wonder is, that all technical distinctions growing out of the use of seals, such as the Statute of Limitations, plea to the consideration, etc., are not at once uni-

versally abolished. The only reason ever urged at this day, why a seal should give greater evidence and dignity to writing is, that it evidences greater deliberation, and therefore should impart greater solemnity to instruments. Practically we know that the art of printing has done away with this argument. For not only are all official and most individual deeds, with the seals appended, *printed* previously, and filled up at the time of their execution, but even merchants and business men are adopting the same practice, as it respects their notes.

Once the seal was everything, and the signature was nothing. Now the very reverse is true: the signature is everything, and the seal nothing. * * *

So long as seals distinguished identity, there was propriety in preserving them. And as a striking illustration see the signatures and seals to the death warrant of Charles the First, as late as January, 1648. They are 49 in number, and no two of them alike. But to recognize the waving, oval circumflex of a pen, with those mystic letters to the uninitiated, L. S. imprisoned in its serpentine folds, as equipotent with the coats of arms taken from the devices engraven on the shields of knights and noblemen; shades of Eustace, Roger de Beaumont, and Geoffry Gifford, what a desecration! The reason of the usage has ceased; let the custom be dispensed with altogether.

* * * * *

With these desultory remarks I am content to leave the law, learning and logic of the case to my brother *Warner*, to whom it legitimately belongs, and who, I have no doubt, will do ample justice to the argument, and with whom I concur, in *retaining* the writ of error.¹

¹The entire opinion, only a small part of which is given here, is replete with wit and learning, and a reading of it will afford both entertainment and profit.

CHOATE V. SPENCER.

*Supreme Court of Montana. 1893.**13 Montana, 127.*

Action to annul sheriff's deed. Defendants' demurrer to the complaint was sustained by HENRY, J. Reversed. PEMBERTON, C. J.

* * * * *

The appellant insists that the summons issued out of the district court of the fourth judicial district of the territory of Montana, in and for Choteau county, on the seventeenth day of June, 1888, in the suit of Jere Sullivan against this appellant, was absolutely void, because it was not authenticated by the seal of the said court. If this contention is correct, the district court never acquired jurisdiction of this appellant, who was defendant in that suit, by the issuance and service of such summons; and any judgment said court may have entered in said cause, as well as the execution issued for the enforcement of such judgment, and all other proceedings thereunder, including the levy thereof on the property of appellant, and the sale and execution and delivery of the sheriff's deed complained of, would necessarily be null and void. * * * * *

At common law, a writ issuing from a court having a seal, in order to be considered authentic or of any value, must be attested by the seal of the court from which it is issued. The laws of this state provide that the district courts shall have a seal (Code Civ. Proc. Sec. 527) and that the clerk of the court shall keep the seal (Code Civ. Proc. Sec. 528). And section 68 of the Code of Civil Procedure requires that the summons must be issued under the seal of the court. So that, under our statutes, there is no departure from the common law rule requiring such writs to be authenticated by the seal of the court from which they issue. The appellant has cited a number of authorities holding the common law doctrine that such writs must be authenticated by the seal of the court from which they are issued in order to give them validity, and without which they would be void. The principal case relied upon by appellant in support of his contention that the summons under discussion was void for want of

the seal of the court is *Insurance Co. v. Hallock*, 6 Wall. 556. This case went to the supreme court of the United States, from Indiana, and involved the validity of a deed executed and delivered by a sheriff to real estate, under an order of sale, under a statute of that state. The statute required the order of sale to be issued under the seal of the court. The seal was omitted from the order of sale. In delivering the opinion of the court, Mr. Justice Miller, says: "If the paper here called an 'order of sale' is to be treated as a writ of execution or *fieri facias* issued to the sheriff, or as a process of any kind issued from the court, which the law required to be issued under the seal of the court, there can be no question that it was void, and conferred no authority upon the officer to sell the land. The authorities are uniform that all process issuing from a court which by law authenticates such process with its seal is void if issued without a seal. Counsel for plaintiffs in error have not cited a single case to the contrary, nor have our own researches discovered one. We have decided in this court that a writ of error is void for want of a seal, though the clerk had returned the transcript in obedience to the writ. We have held that a bill of exceptions must be under the seal of the judge." This was a collateral attack made upon the deed executed by the sheriff, under the order of sale from which the seal had been omitted. Counsel for the respondents contend that the case just cited is not controlling, and claim that the Indiana courts have declined to follow the rule therein asserted, and cite a number of Indiana cases in support of their position. From an examination of the Indiana cases cited by respondents we are of opinion that the departure from the rule asserted in *Insurance Co. v. Hallock*, 6 Wall. 556, has been occasioned by the legislation in Indiana since the decision in 6 Wall. 556. In support of this view, we quote from *State v. Davis*, 73 Ind. 360, this case being cited by respondents. In this case the court say: "It is undoubtedly true, as appellees insist, that at common law a writ issuing from a court must, in order to be entitled to be considered as regular and authentic, be attested by the seal of the court from which it issued. (*Williams v. Vanneter*, 19 Ill. 293; *State v. Flemming*, 66 Me. 142; 22 Am. Rep. 552; *Wheaton v. Thompson*, 20 Minn. 196; *Reeder v. Murray*, 3 Ark. 450.)

The case of *Insurance Co. v. Hallock*, 6 Wall. 556, does decide that an order of sale issued by a court of this state was void because not attested by the seal of the court. It has also been held by this court that, where there is no statute to the contrary, a writ or record must be attested by the seal of the court from which it comes. (*Jones v. Frost*, 42 Ind. 543; *Hinton v. Brown*, 1 Blackf. 429; *Sanford v. Sinton*, 34 Ind. 539.) The older cases did hold that a writ lacking the seal of the court was absolutely void, but there is much conflict upon this point among the modern cases, many of them holding that such a writ is not void but merely voidable. Our court long since held that such a writ was not void. It is true, as argued by appellees, that a summons so clearly defective as to be insufficient to confer jurisdiction cannot, after judgment, be so amended as to give jurisdiction. If a summons without a seal be conceded to be void, then there can be no amendment, for it is axiomatic that a void thing can not be amended. The liberal provisions of our statute respecting the summons would take such writs from under the old common-law rule, even if it were conceded that it is the rule which must be adopted respecting other writs. The provisions of the code upon this subject are contained in article IV., and the provision which directly bears upon this point is found in section 37, and is as follows: 'No summons or the service shall be set aside or be adjudged insufficient where there is sufficient substance about either to inform the party on whom it may be served that there is an action instituted against him in court.''' It must appear as conclusive that the court in this case would have held the summons void but for the statute of Indiana, quoted in their opinion. This case seems to us to be strong authority for holding that, but for the statute of Indiana in relation to the essentials of a summons, that court would have held to the doctrine contained in 6 Wall. 556, to-wit, that such writs, without the seal of the court from which they issued, are void.

* * * * *

The appellant further contends that, at the time of the issuance and service of the summons under discussion, Montana was one of the Territories of the United States, and for this reason the opinion of the supreme court of the United States in 6 Wall. 556, is decisive of the question as

to the validity of said summons, and controlling upon this court in the determination of this question; and relies upon the authority and reasoning in *Sullivan v. City of Helena*, 10 Mont. 134. We are of opinion that this position is unassailable, our statute being, in effect, the same as that of Indiana at the time of the rendition of the opinion in 6 Wall. 556. This reasoning and holding do not in our opinion, contravene section 119 of our Code of Civil Procedure, which provides that "the court shall in every stage of an action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the parties; and no judgment shall be reversed or affected by reason of such error or defect." This section presupposes an action pending, of which the court has acquired proper jurisdiction, and we are not passing upon the powers of the court under such circumstances. We hold in the case at bar that the summons—the jurisdictional writ—under the law and decisions in force and controlling in this jurisdiction at the time of its issuance was void, because not issued under the seal of the court. If this case involved a defective process, issued subsequent to summons, and the acquiring of jurisdiction by the court thereunder, then the contention of respondents that such defect or irregularity could be amended or disregarded might be urged with great force. Judgment reversed and cause remanded, with directions to overrule the demurrer.

*Reversed.*¹

HARWOOD, J. and DEWITT, J., concur.

¹Where the requisites of a summons or other writ are prescribed by constitution or statute, it is frequently held that such constitutional or statutory requirements are mandatory, that the writ is void without all of them, and that the want of any one cannot be supplied by amendment. *Gordon v. Bodwell*, (1898) 59 Kan. 51, 51 Pac. 906; *Sharman v. Huot*, (1898) 20 Mont. 555, 52 Pac. 558.

AMBLER V. LEACH.

Supreme Court of Appeals of West Virginia. 1879.

15 West Virginia, 677.

At the fall term, 1869, an office-judgment was confirmed by the circuit court of Wood county in favor of James M. Stephenson, Thompson Leach and K. B. Stephenson, partners under the firm name and style of Stephenson, Leach & Co., against John Connell and J. G. Blackford for \$310.-49, with interest from September 25, 1869, till paid, and costs of suit. * * * The summons, by which this suit was commenced, was as follows:

“State of West Virginia.

“*To the Sheriff of Wood County, Greeting:*

“We command you that you summon John Connell and J. G. Blackford to appear before the judge of our circuit court for Wood county at rules, to be held in the clerk’s office of said court, on the first Monday in August next, to answer James M. Stephenson, Thompson Leach and K. B. Stephenson, partners under the name and style of Stephenson, Leach & Co., of a plea of debt for \$301.75, damages \$20.00. And have then and there this writ.

“Witness, William H. Hatcher, clerk of our said circuit court, at the court house of said county, the day of and in the year of the State.”

* * * At the time this judgment was rendered J. G. Blackford owned several parcels of land in said county, and also a considerable amount of personal property. On the 23rd day of February, 1876, he conveyed all his property, real and personal, to B. Mason Ambler, trustee, for the payment of all his debts ratably. This conveyance was duly recorded the same day, October 12, 1878, that this trustee instituted this suit.

In his bill he states all the above facts, filing with it a copy of the record in this common law suit, a copy of this execution and return thereon and an abstract of this judgment from said judgment lien docket. He alleges in his bill that this judgment was a mere nullity, as the summons, which was the commencement of the suit, was not dated and was not signed by the clerk. But says that it being

claimed to be a valid judgment, and being on the judgment lien docket, it is a cloud on the real estate conveyed to him as trustee, and prevents his selling to advantage the real estate conveyed by said deed, as he is thereby authorized and directed to do. * * * The two Stephensons being dead, the bill makes Okey Johnson, their several executor, Thompson Leach, J. G. Blackford and John Connell defendants, and asks the court to declare said judgment null and void. * * * The court by its final decree * * * dismissed the bill and decreed that the plaintiff pay to said defendants their costs in said suit expended.

From this decree the plaintiff, B. M. Ambler, on March 22, 1879, obtained from this court an appeal and *supersedeas*.

GREEN, President, delivered the opinion of the court:

The first question presented by this record is: Was the judgment of the circuit court of the fall term, 1869, null and void, because the summons in the suit in which such judgment was rendered was blank as to its date, and because it was not signed by the clerk or his deputy? The appellant's counsel claims that it is absolutely void, and should be so pronounced by this Court; while the appellees claim that it was only voidable by plea in abatement, or motion to quash it in the original suit, or at furthest by having the judgment set aside by a motion by the defendants before the circuit court which rendered it, or, if it refused, by a writ of error after such refusal and a reversal of this judgment by this Court; and these steps not having been taken, this judgment is valid, and a lien on the real estate of the defendant, Blackford, superior to the lien created by said deed of trust.

* * * * *

* * * In some of the States their constitutions or laws require that process shall be signed by the clerk of the court, and sealed with the seal of the court, and as the sealing as well as signing is clearly intended for the like purpose, of authenticating the process, the decision as to the effect of omitting to attach the seal of the court I regard as bearing directly on the question under discussion in this case. In Maine, where the process has to be under the seal of the court, it was decided that a writ returnable to the Supreme Judicial Court, which ought to have had the seal of that

Court attached to it, but did not have, was to be quashed on motion of the defendant, though made at a term long subsequent to the term at which the writ was returnable. The court say: "Upon the whole we regard the seal as a matter of substance, and the process, being an original writ, not amendable. We regret that the defect was not pointed out at an earlier stage of the proceedings; but we are not satisfied that it is now too late to take the objection. We do not abate the proceedings so much for the sake of the defendants, as because the plaintiff has departed from a substantial requirement of law of a public nature, in bringing his action." It is obvious that the court did not regard this process as absolutely null and void, but as a voidable process; but the defect being a substantial one, the defendant was not confined to the term at which process was returnable to make his motion to quash this process, but was allowed to do so long afterwards. Still if he had permitted a judgment to be entered by default, the court would doubtless have held this judgment valid. All they did decide was, that at any time pending the case he might avoid this process; but unless avoided, it was good.

That it was not a mere nullity and absolutely void is shown by the case of *Sawyer v. Baker*, 3 Greenl. (8 Me.) 29, where the court held that an execution issued without the seal of the court, which the law required, was not absolutely void, but might be afterwards amended. And this decision is approved in the case of *Bailey v. Smith*, 3 Fairfield, (12 Me.) 196. So in Massachusetts. Upon a plea in abatement to a writ, that the seal of the court was not attached, the court held the plea good and refused to permit the writ to be amended by attaching the seal. *Hall v. Jones*, 9 Pick. 446. But in New York in the case of *Pepron et al., v. Jenkins*, Coleman & Caine's cases 60, on a motion to quash a writ, because not signed by the clerk, the court permitted the writ to be amended by the clerk's then signing it. Both these cases evidently treat the writ as not void, but as voidable only. And in the *People v. Dunning*, 1 Wend. 16, the court expressly decide that an execution, to which the seal of the court was not attached as the law requires, was not void or a nullity, but only voidable, and the sureties of a sheriff were held liable for money collected under such an execution. In the case of *Stayton v. New-*

comer, 1 Eng. (Ark.) 451, there was a judgment by default on a writ to which the seal of the court was not attached. Upon writ of error this judgment was reversed. We could not from this infer that the writ was a mere nullity, but rather the reverse, that it was voidable, and was avoided by the defendants obtaining a writ of error. But Oldham, Judge, in delivering the opinion of the court, used very strong language to show that the writ was a mere nullity. He says, "this writ totally fails to confer any jurisdiction over the person of the appellant. The writ being unsealed is a mere nullity, and as such imposes no legal obligation upon the appellant to appear and defend against the action. The judgment by default is therefore erroneous and ought to be reversed." This language is so specific that it is obvious that the court intended to hold that a writ to which the seal of the court was not attached, was an absolute nullity, unless confirmed by the defendant's appearance. And that a judgment by default based on it would also be null and void, even had it not been reversed by the Appellate Court.

* * * * *

In *Parson v. Swett*, 32 N. H. 88, the court decided that, though the Constitution of New Hampshire expressly provides that "all writs shall bear the *teste* of the chief justice of the court," yet a writ not bearing this *teste* was not void, but only voidable by motion to quash made at the proper time in the progress of the suit. The court say: "The Constitution of this State, article 87, provides that all writs issuing out of the clerk's office in any court of law, shall be in the name of the State of New Hampshire, shall be under the seal of the court whence they issue, and bear *teste* of the chief, first or senior justice of the court, and shall be signed by the clerk of said court, yet a writ which issues without the proper *teste* is not in terms declared by the Constitution to be void, and we think it is not to be held so by construction. In the same article of the Constitution writs are required to be signed by the clerk; but a writ is not void because it wants the signature of the clerk; and the objection will be overruled, if not seasonably made. *Lovell v. Sabin*, 15 N. H. 37. In Massachusetts, upon the construction of a similar provision of their Constitution, it has been decided that the want of a

proper *teste* is mere matter of form, and must be taken advantage of by seasonable objection; otherwise it will be held to be waived. *Ripley v. Warren*, 2 Pick. 592. In this case the want of a proper *teste* did not make the writ void. If a motion to quash had been seasonably made, the writ might have been amended; for it was not void, and the court had jurisdiction. It was so decided in *Reynolds v. Donnell*, not reported. The ordinary process of the court never in fact bears the actual signature of the chief justice, but his name is printed into the blank writs before they are delivered out of the clerk's office. The *teste* of a writ is therefore in practice a mere matter of form."

Yet in *Hutchins v. Edson*, 1 N. H. 139, a sheriff was held not liable for the escape of a prisoner, whom he held in custody, because the execution under which he held him was not under seal, and the court say: "A writ not under seal is not process warranted by law. The Constitution in our opinion has rendered a seal essential to the validity of all our writs; and no officer can justify anything done under a writ of execution not under seal. It is no better warrant for arrest than a piece of blank paper." Commenting on this case the court in *Parson v. Swett*, 32 N. H. 89, say: "The general language used in that case might tend to the conclusion that writs of *mesne*, as well as final, process were *void*, unless under the seal of the court. It is obvious, however, that there is an important distinction between the two kinds of writs, because to a writ of final process the defendant has no opportunity to object, by plea or motion that it wants a seal or other constitutional requisite. It may perhaps be found, when a case shall arise which presents the question, that the doctrine of *Hutchins and Edson* ought not to be extended beyond the point expressly decided. *Foote v. Knowles*, 4 Metc. 586; *Brewer v. Libbey*, 13 Metc. 175; *People v. Dunning*, 1 Wend. 17; *Jackson v. Brown*, 4 Cow. 550."

* * * * *

There has been in the State of Arkansas a very large number of decisions as to the effect upon a judgment of the writ being defective in almost all sorts of ways. The decisions at first were quite strong, or the language used in them strong, to indicate that for many of these defects the judgments would be void. These cases were all reviewed

however in *Mitchell v. Conley*, 8 Eng. 414, and the court on full review of them then held an original summons not running in the name of the State is not void, but amendable, and may be amended after plea in abatement filed. In *Rodd, surv. v. Thompson & Barnes*, 22 Ark. 363, the court held a writ of summons is not void for want of the official seal of the clerk. It is voidable only and may be amended on application to the court; but if no application to amend has been made, the defect is ground for a reversal of judgment by default. The court say: "It has been the practice of this court to reverse judgments by default in cases where the summons were without the official seal of the clerk, and such writs were treated as void. But in *Mitchell v. Conley*, 13 Ark. 418, the court upon review of its previous decisions held that they were not void for such defects, but voidable, and the court below possessed the power to amend them on application. Here no application was made to amend; and the defect in the writ is cause of reversal."

The authorities we have cited show that the decided weight of authority is against holding a writ absolutely void, because not signed by the clerk, or not having the seal of the court attached to it, or not being properly attached, or for not running in the name of the State, even where these things, or any of them, are required in the Constitution; but such defects in a writ render it only voidable. In some States it is held that these things, or most of them, are so much a matter of form, that no advantage can be taken of them except by a plea in abatement, or by a motion to quash made at the proper time. Others hold that while none of these defects render a writ void, or the judgment based on it a nullity; yet they, or some of them, are such defects of substance that the writ can be avoided by motions to quash, though not made promptly, and where on such a defective writ, at least where some of these defects exist, a judgment by default is obtained against the defendant, it will be reversed on writ of error. But no decision, which I have been able to find, holds in a collateral proceeding that such a judgment is a nullity. It is true, as we have seen, that some of the judges use very strong language, from which we might infer, that in their opinion a judgment by default based on a writ in which some of these defects existed was an absolute nullity; but we are liable

to mistake their views, as in none of the cases, we have seen, were they called upon to decide more than that the judgment might be reversed, or the writ quashed on motion in the same suit; and it is obvious that this might properly be done, though the judgment was not a mere nullity.

* * * * *

In this case the defendants in the common law suit had a summons regularly served on them by the sheriff, which on its face showed it came from the clerk's office, though not signed by the clerk. It was served on the 2nd. day of August, 1869, and required them to appear at a specified time to answer the plaintiff's demand. It is true the summons was not dated, but the law required that a writ should be returned in not exceeding ninety days. The defendants knew therefore that this writ had been issued at sometime within the preceding ninety days, and could not therefore have supposed it was issued in some preceding year, as has been suggested, and must therefore have known at what specific time they were required to appear and answer. They also knew in what court to answer from the face of the writ, and at what particular time to answer. It does seem to me therefore that such a writ ought not to be regarded as an absolute nullity. It was no doubt very defective and might have been properly quashed; but as it really gave with reasonable certainty all the information to the defendants that a regular and perfect writ would have done, it cannot justly be regarded as a nullity.

* * * * *

For these reasons the decree of the circuit court of October 28, 1878, * * * dismissing the plaintiff's bill at his costs, must be affirmed. * * *

Decree affirmed.

SECTION 6. INDORSEMENT OF AMOUNT CLAIMED.

ELMEN V. CHICAGO, BURLINGTON & QUINCY
RAILROAD COMPANY.*Supreme Court of Nebraska. 1905.**75 Nebraska, 37.*

LETTON, C. This action was brought by George P. Elmen, as administrator of the estate of Robert Stewart, deceased, to recover damages for the widow and next of kin on account of the death of his intestate, which he alleges was caused by the negligence of the defendant railroad while the deceased was working in its Havelock shops. * * * * On July 17, 1901, one day before the time limited by the statute for the beginning of an action for death by wrongful act, a petition was filed in this action and a summons issued. The praecipe for the summons did not ask for the indorsement of any amount for which judgment would be taken if the defendant did not appear, nor did the summons which was issued have either upon its face or indorsed thereupon any amount for which judgment would be taken in such case. This summons was duly served upon the defendant and returned. No appearance was made and no default was entered. On February 10, 1902, the plaintiff filed a motion requesting to be permitted to amend the praecipe so as to show the amount for which plaintiff would take judgment, in case of default, to be \$5,000, that the clerk be directed to amend the original summons by indorsing that amount upon it, and that an alias summons be issued, with that amount indorsed, requiring the defendant to answer on or before March 17, 1902, and that the amended summons, a copy of the motion and order allowing it, and the alias summons, be served upon the defendant the same as an original summons. The court, by an *ex parte* order, sustained the motion. * * *

* * * We have repeatedly held that no judgment can be rendered in excess of the amount indorsed upon the summons in case of default in an action where the only relief sought is a money judgment. *Crowell v. Galloway*, 3 Neb. 215; *Roggencamp v. Moore*, 9 Neb. 105; *Co-operative Stove*

Co. v. Grimes, 9 Neb. 123; *Forbes v. Bringe*, 32 Neb. 757. The plaintiff in error contends that the amendments to the summons and praecipe, which were permitted by the court, relate back to the time of the issuance and service of the original summons, and that therefore the action was begun within the two year period, while the position of the railroad company is that, since no judgment could have been rendered for any amount whatever upon the summons as it was when issued and served, an amendment which gave to the writ a force and effect of which it was entirely devoid was in effect the beginning of a new action, and that, in such case, if the bar of the statute had fallen, it could not override the same. We have been cited to no cases directly in point in either this or any other jurisdiction. This court has held that a motion to amend an affidavit for attachment may be sustained, even though a motion is pending to quash the writ on account of the very defect which it is sought to cure by amendment. *Struthers v. McDowell*, 5 Neb. 491; *Rathman v. Peycke*, 37 Neb. 384; *Moline, Milburn & Stoddard Co. v. Curtis*, 38 Neb. 520; *Dobry v. Western Mfg. Co.* 57 Neb. 228. In such cases the amendment relates back to the issuance of the writ of attachment. The general rule is that irregular or voidable process may be amended, but that void process is incapable of amendment. The reasons are obvious. A void writ is not a writ, and an amendment which would give such a writ force and effect would call the process into being at the time of the so-called amendment. The courts of other states have not been uniform in their holdings as to the effect of the failure to include an *ad damnum* clause in a summons or to indorse upon the back of the writ the amount claimed, where required by statute. See *Campbell v. Chaffee*, 6 Fla. 724; *Kagay v. Trustees*, 68 Ill. 75; *State v. Hood*, 6 Blackf. (Ind.) *260. In Ohio, in such a case, it was held by an inferior court that such a summons could be amended, but unless appearance were made the amendment would have to be served. *Williams v. Hamlin*, 1 Handy 95. While in another such court in the same state it was held that a judgment rendered upon the service of a writ with no amount indorsed was erroneous, but not void, and therefore valid and subsisting, since not directly attacked. *Gillett v. Miller*, 12 Ohio C. C. 214.

If the first position is correct the latter is wrong. The holdings are clearly irreconcilable. This court, however, in an early case, pointed out the proper procedure and indicated the effect of such an amendment. In *Watson v. McCartney*, 1 Neb. 131, the action was to enforce a vendor's lien upon certain lands. The summons was indorsed with the notice required in cases where a judgment for money only is sought. The defendants did not appear, and the indorsement was by leave of court amended so as to conform to the nature of the action, and judgment was rendered accordingly. In that case as in this both the praecipe and the summons were defective as to indorsement. In the opinion Judge LAKE says:

"So well am I satisfied that this amendment was irregular and unwarranted, that I have not undertaken to look into the cases relating to amendments cited by counsel for the defendant in error. Although cases might be found to support such a proceeding I should deem it unwise, in the settlement of the practice which is to govern in the courts of this state, to conform to precedents of that character. * * * * * Had the defendants appeared, the amendment might have been made by order of the court. The office of the notice indorsed on the summons is to advise the defendant of the amount claimed. He then is at liberty to consent or resist. * * * * * The plaintiff's course was to take judgment for the amount indicated in the notice, with interest from April 1, 1897. If he desired a further or greater recovery, he should have obtained leave and issued another summons, such as was proper in the case." See also *Reliance Trust Co. v. Ather-ton*, 67 Neb. 305; *Atchison, T. & S. F. Ry. Co. v. Nicholls*, 8 Colo. 188, 6 Pac. 512.

In the instant case the summons was issued in all respects in conformity with the praecipe which was filed, and in conformity with law. It is not a case where an error has been made by a clerk of the court or other officer. In such a case, as, for instance, where an error has been made in the date of the return day of the summons or the answer day, we have permitted amendments to be made, and such amendments relate back to the time of the issuance of the summons. *Barker Co. v. Central West Investment Co.* 75 Neb. 43. The court, in such case, has

power to preserve the rights of the defendants by granting such additional time to plead as may be necessary. In such cases, the defendant is fully advised of the nature of the judgment which is sought to be rendered against him, and the only prejudice which he can suffer is being deprived of the necessary time in which to prepare his defense. The case here, however, is different. Upon its face the summons was valid, but it failed in anywise to apprise the defendant of any money demand against it. No sum is mentioned either on the face or upon the back of the writ. This being the case, an amendment to the praecipe which directs the clerk to indorse a sum of money upon the writ, and an indorsement of the same upon the summons, the defendant not being in court, injects into the case a liability upon the defendant to which he was not subject when the writ was issued, and the effect as to him is the same as the amendment of a petition by setting forth a new cause of action, or the issuance of an alias summons. The defendant may have been, and evidently was, perfectly satisfied to let judgment go against him upon the process as it was first issued, but, when the same was made valid and effectual to charge him with a money judgment, it was the same as beginning a new action, and he had the right to the time prescribed by law for his answer after the indorsement.

It is a significant fact that the plaintiff did not rely upon the amended praecipe and summons to bring the defendant into court, but procured the issuance and service of a new summons, fixing the answer day at a future date. Taking this fact into consideration, we conclude that the action was begun so far as the liability for the amount indorsed upon the summons is concerned, at the time the amendment was made and the new summons issued. If during the interval between the issuance of the summons and its amendment, or the issuance of the new summons, the bar of the statute of limitations has fallen, it cannot be removed by an amendment or a new summons which virtually begins the action. Since the bar of the statute had fallen at the time of the amendment and the issuance of the new summons, no right of action existed, and the judgment of the district court is correct.

We recommend that the judgment of the district court be affirmed.

AMES and OLDHAM, CC., concur.

By the court: For the reasons stated in the foregoing opinion, the judgment of the district court is

*Affirmed.*¹

¹In *Lawton v. Nicholas*, (1903) 12 Okla. 550, 73 Pac. 262, it was held (syllabus by the court): "A summons in an action for the recovery of money only should have endorsed thereon the amount for which judgment will be rendered if the defendant fails to appear. Summons without such endorsement is sufficient to give the court jurisdiction of the person and of the subject matter, and the judgment rendered thereon is not void, but voidable only, and execution to enforce such judgment cannot be enjoined." Following *Kansas* cases.

SECTION 7. ALIAS WRITS.

PARSONS V. HILL.

Court of Appeals of District of Columbia, 1900.

15 Appeal Cases, 532.

Mr. Justice MORRIS delivered the opinion of the Court:

This cause comes here by special appeal; and the question involved in it is one of considerable importance in the practice of the law in this District under existing conditions.

On November 2, 1896, the appellant, Joseph H. Parsons, as plaintiff, instituted a suit at common law against the appellee, Alice S. Hill, as defendant, in the Supreme Court of the District of Columbia, by filing a declaration in assumpsit to recover from the appellee the sum of ten thousand dollars which he claimed to be due to him for professional services rendered to the appellee and another person in the matter of the location of some land scrip. This claim was set forth with sufficient minuteness in a bill of particulars annexed to the declaration, which itself was in the common counts, but which, from the record before us, does not appear to have been supported by any affidavit; and, of course, no affidavit was required, except for the purpose of a summary judgment, if one should be sought.

On the same day on which the declaration was filed, a summons was issued out of the office of the clerk of the court, in the form prescribed by the rules of the court, requiring the defendant to appear in court on or before the twentieth day after service of the writ, to answer the plaintiff's suit, and to show cause why the plaintiff should not have judgment for his cause of action. This summons, with a copy of the declaration, according to the rules and practice of the court, was placed in the hands of the marshal for service, and was by him returned to the clerk's office on November 25, 1896, with the indorsement thereon that the defendant could not be found. It is understood that she was absent from the District at the time, and out of the jurisdiction.

Nothing further was done for nearly two years. On October 11, 1898, a second summons was issued; and this was served on the same day on the defendant, and was returned by the marshal into the clerk's office with the indorsement thereon: "Served copies of the declaration, notice to plead, affidavit, and this summons on the defendant this 11th. day of October, 1898." * * *

* * * * * On November 2, 1898, the defendant, by her attorneys, moved to vacate the second or *alias* summons issued and returned in the cause, on the ground, as alleged, "that the same was improvidently issued, since the original summons issued in the said cause was not legally and duly continued, and that therefore there has been a discontinuance of the said cause." This motion was allowed by the court, and the second or *alias* summons was accordingly vacated.

Thereupon the plaintiff, by his attorneys, moved the court to direct the clerk to enter upon the docket continuances from the date of the original summons. This motion was denied. Then the plaintiff moved for a judgment against the defendant for want of a duly verified plea. This motion also was denied. The plaintiff next moved for a judgment by default; but this motion likewise was denied.

* * * * *

* * * * * The error, if any there was, consisted in the order to vacate the second, or what is called the *alias* summons in the case, or else in the refusal of the court to direct the entry of continuances as preliminary to the

issue of a second or *alias* writ. And it was from either one or both of these orders that the appeal should have been sought.

Yet, under the special circumstances of the present case, it does not seem to us that the ends of justice or any good purpose would be subserved by our refusal in this appeal to consider the true and substantial question in controversy between the parties. * * *

That question is, whether, when a declaration in a suit at common law has been filed and a writ of summons has been issued under it in pursuance of the existing rules of the Supreme Court of the District of Columbia, and a return has been made upon that writ that the defendant cannot be found, either by reason of absence from the jurisdiction or for some other cause, and no further proceeding is had in the case, no further writs issued and no continuances entered, until nearly two years afterwards, when a second or *alias* writ of summons is issued and actually served upon the defendant, the suit has become abated or discontinued, and the plaintiff is compelled to have recourse to a new suit, if he would further prosecute his cause of action?

Counsel in this case, with admirable ingenuity and incisive logic, have gone to the very foundations of the common law on the subject of writs, and of continuances, and especially of proceedings under the old original writ, where-with, under the ancient English practice, suits in the Court of Common Pleas were always begun. * * *

We do not think that it is necessary to follow counsel very far in their discussion of the practice under the old common law. The original writ, by which all civil suits in the Court of Common Pleas in England were formerly commenced, with its incidents of summons, attachment, *distringas*, distress infinite, and outlawry, was never in force in this country, either during the colonial period or since our Declaration of Independence. While our ancestors brought with them from England not only the substantive law of that country, so far as it was suited to their circumstances, but also their law of civil procedure, there was never any place in our system for the original writ. From the very beginning we proceeded upon a radically different theory of jurisprudence in that regard. In England,

the sovereign was the source of all authority, and the courts were his courts, and had no right to proceed in any cause without his authority and permission. It was the principal function of the original writ to give that permission. With us, on the contrary, the judicial power has always in fact been an independent co-ordinate branch of government; and the Constitutions adopted after the Declaration of Independence only recognized and emphasized that fact. It never required any special license or authority from any executive, by way of original writ or otherwise, to exercise its functions. The proceedings in England under the original writ are, therefore, no safe criterion for us in our practice.

In our practice, a simple writ of summons, or a *capias ad respondendum*, a form of proceeding derived to us, from the English King's Bench, was the usual mode for the commencement of suits; and these two, which were in form executive, and not judicial writs, although actually issued by the courts, took the place of the old original writ. But in neither practice was it sought to have, or was it supposed that there could properly be, any pleadings whatever, until both parties, the defendant as well as the plaintiff, were in court; and the plaintiff's cause of action, although in the summons or *capias*, and in the memorandum or *praecipe* given to the clerk of the court, as the preliminary to the issue of the process, it was to a certain extent indicated, was never formerly stated in the shape of a declaration until after the appearance of the defendant in court in response to the summons or *capias*.

But a very radical departure from ancient usage, and from the former usage of our own jurisdiction, was effected, when, by the Act of Congress of March 3, 1863, Chap. 91 (12 Stat. 762), the Supreme Court of the District of Columbia was established, with power given to it in the act of its creation "to establish such rules as it might deem necessary for the regulation of the practice of the several courts organized by the act, and from time to time to revise and alter such rules;" and when, soon after its organization, it accordingly promulgated new rules of pleading and practice to be observed in the conduct of legal proceedings thereafter to be instituted in that court. The radical character of these rules with reference to the ante-

cedent practice is well recognized by counsel in the statement advanced in argument, that if their validity had been properly tested in due time after their promulgation, they would not have stood the ordeal of judicial scrutiny. But this argument is not further insisted on than in the point made in the brief of counsel for the appellee, that rules of court cannot be permitted to contravene common right. With reference to this, however, it is sufficient to say here that ordinarily there can be no such thing as a common right in the retention of existing rules of pleading and practice. Courts have made these, and courts may unmake them, especially under legislative authority given for the purpose. Alterations in the code of civil procedure must be assumed to have been made, as they are no doubt always intended to be made, for the better administration of the substantive law, and not to impair individual right. Certainly the change in the civil procedure of the District of Columbia effected by the promulgation of the rules of the Supreme Court of the District in 1863, being in line with the general modification of the ancient practice before and afterwards effected in other parts of our country, and now, it is believed, become universal throughout the United States, can not well be said to be antagonistic to common right, when the common sentiment everywhere has demanded the change.

* * * * *

Under these rules, as thus modified, it has become the settled practice for the marshal to make return of all writs of summons placed in his hands for service at or before the expiration of twenty days. If he makes actual service of the writ, he returns it forthwith with the indorsement that he has so served it. If the defendant cannot be found, the marshal holds the writ for twenty days and then returns it into the clerk's office, with the indorsement thereon that the defendant is "not to be found." In either case the writ by the return becomes *functus officio*. In the event that it has not been served, it cannot be taken out again for actual service—a new writ or *alias* must be resorted to for that purpose. Now, the question is presented whether, under the rules of the Supreme Court of the District of Columbia, as they now exist and as they existed when the present proceedings were instituted, in order to

keep a suit alive and to prevent a discontinuance, successive writs of summons without intermission must be issued until actual service is had upon the defendant, each successive writ to bear teste and to be issued on the date of the return of its predecessor into the office of the clerk of the court.

It is not apparent to us what good purpose is to be subserved by the continuous and uninterrupted issue of writs of summons in periods of twenty days, when they cannot be actually served, and it is perfectly well known to the plaintiff that they cannot be served, on account of the absence of the defendant from the jurisdiction or for some other sufficient cause. A rule of practice that would require such continuous issue of process might well become an intolerable burden, in consequence of the utterly useless trouble and the unnecessary costs to which the parties might be put, and which would be of no possible benefit to anyone. Such process might have to be continued for years, with the result merely of incumbering the clerk's dockets and the records of the courts with entries of conspicuous inutility. When a defendant has gone out of the jurisdiction within the period allowed for suit by the Statute of Limitations, and a plaintiff thereafter has brought his suit in due time, in order to prevent the accruing of the bar of the statute, as he is undoubtedly entitled to do, there would be neither justice nor sense in requiring him to have writs constantly issued periodically until the defendant returns. The time of such return being indefinite, the result upon litigation would be prohibitory. When the plaintiff is a trustee, executor, administrator, guardian, or something of the kind, and sues in his representative or fiduciary capacity, and it is not only his right, but perhaps his duty to sue, which he may not avoid without grave responsibility, a very grave burden is placed upon him, and a very great impediment is interposed to his assertion of just right, if he is compelled at the same time to incur the penalty of indefinite and interminable costs before the defendant is actually served with process. We cannot think that the law requires anything so unreasonable.

* * * * *

Undoubtedly, as opposed to the useless incumbrance of unserved and unservable writs and the risk of liability for

indefinite and unascertainable costs on the one side, there is the danger on the other side that, if suits were permitted for a long time to lie dormant by the failure to have notice given to defendants when such notice could well be given, these latter might be greatly and wrongfully prejudiced by being brought into court long after the subject matter of controversy has passed out of their minds, when perhaps witnesses are dead and testimony lost, and yet the Statute of Limitations might not be available as a defense. * * *

* * * * *

The suing out of successive writs of summons at intervals of twenty days, each writ to bear teste as of the date of the return of its predecessor into the clerk's office by the marshal, is the only mode pointed out to us, and apparently the only mode that can be pointed out, to effect the actual continuance of process in the present case. But in the rules of the Supreme Court of the District we find no requirement for any such continuance. Those rules, in fact, are entirely silent on the subject; and we are apparently remitted to the practice of the common law. But the common law furnishes no guide, and, in our opinion, no analogy even, for the determination of such a case as the present. As we have seen, the practice under the original writ in England affords no analogy; and, as we think has been sufficiently shown, a requirement for the continuous issue of successive writs, when those writs cannot be served, is unreasonable. We are advised that the usage under the rules of the Supreme Court of the District for upwards of thirty-five years, that is, practically during the whole period of its existence, has been to the reverse of the contention that a continuous issue of successive writs is necessary in order to keep a cause alive, when the first writ has been returned without actual service on the defendant. * * * On the contrary the practice has been quite the reverse—namely, that after the return of the first writ that the defendant cannot be found, no second or *alias* writ is required, until actual service can be had. And that this has been the practice, we understand to be conceded, at all events not to be denied by the appellee; and it seems to be sufficiently established. It may be that this practice or usage is justly amenable to the criticism that it does not conform to the rigid rule of continuity and to the doctrine of continuances as applied

in the old common law. But we think that the radical change in the law of procedure effected by the rules of the Supreme Court of the District had the effect of dispensing with the requirement of actual continuances in the matter of the service of original process to bring a defendant before the court, after one writ had been issued and returned without effect; and that, at the utmost, all that could reasonably be required in such a case would be the entry of fictitious continuances on the record to be made whenever a writ could be actually issued with effect, in accordance with what is understood to have been the practice of the English courts in analogous cases. The making of fictitious entries, however, is not appropriate in our American practice; and it is understood that in the cases in which they are authorized in England, they are wholly dispensed with and are unnecessary in our legal procedure.

We are not to be understood to be holding that the law in regard to continuances is not yet in force. On the contrary, we regard it as yet fully in force in many cases; and it has been so held. *Galt v. Todd*, 5 App. D. C. 350; *Crumbaugh v. Otterback*, 20 D. C. 434; *Thompson v. Beveridge*, 3 Mackey, 170. But wherever it has been held that continuance is necessary, actual continuance is meant. There is no place in our system for the entry of fictitious continuances. *Nicholls v. Fearson*, 2 Cranch C. C. Rep. 526; *Bank v. Brent*, 2 Cranch C. C. Rep. 538; *Baker v. French*, 2 Cranch C. C. Rep. 539; *Thompson v. Beveridge*, 3 Mackey, 170.

But the usage which we regard as having become a rule of practice under the code of rules promulgated by the Supreme Court of the District, has its limitations. That usage has already been stated to be, that when, upon a declaration at common law, filed in that court, a writ of summons has been issued, and has been duly returned by the marshal with the return that the defendant cannot be found, no further writs are required to be issued in order to keep the suit alive, until the defendant can actually be found and a writ can actually be served upon him. But it follows that, when the defendant can be found and the writ can actually be served upon him, it then becomes necessary to follow up the proceeding by the issue of a writ to be actually served; and if the plaintiff fails to have a

writ issued in due time for such actual service, he incurs the risk of having his suit discontinued.

It is open to a defendant, when service of process has been improperly and unduly delayed, to show, upon a motion to vacate the writ, when it has actually been issued, that there has been discontinuance in consequence of failure to have it issued in due time. The writ will be presumed to have been duly issued and duly served, until the contrary is shown; but actual discontinuance of the suit may be made to appear, upon affidavit or otherwise to the satisfaction of the court. And when such actual discontinuance has been made to appear, the court may properly vacate the writ which has been served upon the defendant, and discontinue the cause, and remit the plaintiff to a new action, if he chooses to avail himself of it.

* * * * *

Suits at common law, which have been duly commenced by the filing of a declaration and the issue of process thereunder, cannot thereafter be permitted to remain indefinitely within the control of the plaintiff alone. The suit should be effectively prosecuted in good faith, or dismissed. Due diligence in such prosecution is an essential requirement on the part of the plaintiff. If that due diligence is wanting, effect should be given to the rule of law that works a discontinuance of the suit. But under the code of procedure of the Supreme Court of the District, that question of due diligence is a question of fact to be shown to the court by the proper proof. This was not done in the present case; and we think that it was error to vacate the writ without such proof.

The cause will be remanded to the Supreme Court of the District of Columbia, with directions to vacate or rescind the order vacating the *alias* writ of summons issued in the cause, and to vacate all the orders and proceedings had in the cause subsequent thereto; and with directions further to permit the defendant to renew her motion to vacate said *alias* writ, if she so desires.¹

¹ In *Johnson v. Mead* (1885) 58 Mich. 70, the court said: "An examination of the authorities will show that the continuance roll for a long time came to be regarded very much as a matter of form, although it is said in some cases, if the object is to prevent the statute of limitations from running, a strict compliance should be shown. We have no statute upon the subject, but the effect of continuing the suit by the successive issuing of writs has always been regarded as an arrest of the running of the statute when

done in good faith with the intent of prosecuting the suit. *Howell v. Shepard*, 48 Mich. 472 * * * "In this case the record shows the longest interval between the filing of one writ and the issuing of the other was two days; and inasmuch as the return and filing of the one was precedent to the issuing of the other, we see nothing unreasonable in the time taken for issuing the pluries writ. It must be regarded as sufficiently regular to save the running of the statute against the plaintiff's claim."

CHAPTER II.

SERVICE AND RETURN OF SUMMONS.

SECTION 1. PERSONAL SERVICE.

McKENZIE V. BOYNTON.

Supreme Court of North Dakota. 1910.

19 North Dakota, 531.

FISK, J.

* * * * *

When the owner of the property is a resident of this state the statute requires personal service to be made on him of the notice of the expiration of time for redemption. It is respondent's contention, and the trial court so held, that the stipulated facts fail to show a compliance with the statute in this respect. In this we think they are correct. It is not contended by appellant that personal service of such notice was in fact made; the contention merely being that the stipulated facts show the equivalent of personal service. In this they are in error. The delivery by the sheriff of a copy of such notice to W. J. Freede, an employee at the Sheridan House, falls far short of personal service upon McKenzie. For all that is contained in the alleged proof of such service McKenzie may have been actually in his room in said hotel at the time the Sheriff left with said employee the copy of the notice. The personal service required by the statute must, we think, be made in the manner of making personal service of a summons as provided by section 6838, Rev. Codes 1905. That section so far as applicable, reads as follows: "The summons shall be served by delivering a copy thereof as follows; * * * * (7) In all other cases, to the defendant personally, and if the defendant cannot conveniently be found, by leaving a copy thereof at his dwelling house in the presence of one or more of his family over the age of fourteen years; or if the defendant resides in the family of another, with one of the

members of the family in which he resides over the age of fourteen years. Service made in any of the modes provided in this section shall be taken and held to be personal service. * * * Plaintiff had no family nor was he residing in the family of another within the meaning of the statute. His residence was at a public hotel; hence the service which, under the statute, would be valid and binding on him could be made only by delivering to him personally the notice required. For like reasons the attempted substituted service by registered mail, even if the proof thereof was complete, is utterly unavailing. As said by this court in *Bank v. Holmes*, 12 N. D. 38, 94 N. W. 764; "The term 'personal service' has a fixed and definite meaning in law. It is service by delivery of the writ to the defendant personally.¹ Other modes of service may be given the force of such service by legislative enactment. But the use of the words 'personal service,' unqualified, in a statute means actual service by delivering to the person, and not to a proxy"—citing *Hobby v. Bunch*, 83 Ga. 1, 10 S. E. 113, 20 Am. St. Rep. 301. See also 19 Encyc. Pl. & Pr. 613, 630 et seq.; 32 Cyc. 448, 457, and cases cited. See also *R. I. Hospital Trust Co. v. Keeney*, 1 N. D. 411, 48 N. W. 341. * * *

* * * * *

¹In the absence of any statutory provision on the subject, it was held in *Ball v. Shattuck*, (1855) 16 Ill. 299, that personal service must be by reading the writ to the defendant. Delivery of a copy is not sufficient. *Law v. Grommes*, (1895) 158 Ill. 492, 41 N. E. 1080.

KROTTER & CO. V. NORTON.

Supreme Court of Nebraska. 1909.

84 Nebraska, 137.

EPPERSON, C.

Plaintiff instituted an action in equity to foreclose a chattel mortgage given by the defendant, G. W. Norton, to plaintiff upon a frame dwelling house and frame barn situate on land in the possession of mortgagor under a five year lease. The mortgagor and his wife were made defendants, and a summons was issued in which they were

named as "G. W. Norton and wife, Mrs. G. W. Norton." The return of the sheriff showed personal service. * * * Still later and upon default of defendants, the court rendered a decree of foreclosure, and directed a sale of the mortgaged property for the satisfaction of plaintiff's debt. After the sheriff had sold the property, but before confirmation, the defendants filed an application to set aside the sale.¹ * * *

Objection is made that there was no personal service of summons upon Mrs. Norton. It appears from the testimony of the sheriff that the summons was not served by the actual delivery of a copy thereof into the hand of Mrs. Norton, but such service is not necessary to constitute personal service. According to Mrs. Norton's own testimony, we are convinced that there was personal service of the summons upon her. At the time of the service of the summons and the notice of application for injunction, she testified that the sheriff came to their home and into the room where she and her husband were; that the sheriff read the papers aloud, both the notice and the summons, in the presence of both defendants; that she heard them read; that the sheriff handed the two papers to her husband, saying one of them was for the husband and one for the wife; that she knew that there was a paper left there for her, and that she was named therein as the wife of George W. Norton. At the time Mrs. Norton told the sheriff that she did not know what he summoned her for; that she did not sign any papers, nor have any dealings with the plaintiff. Her testimony is corroborated by her husband, also by the sheriff, except the latter testified that he laid the papers intended for Mrs. Norton upon the table, at which she was employed all the time he was there, attending to the breakfast dishes. As we view it, it is immaterial whether the sheriff laid the papers intended for Mrs. Norton upon the table or handed them to her husband. Whichever it was, it was done in Mrs. Norton's presence, with full knowledge on her part that one of the copies of each paper was intended for her. She so understood it, and was as fully informed as though the sheriff had actually delivered the papers into her own hands. This is clearly distinguishable

¹ This was apparently granted, though the report does not expressly say so, and the appeal was taken from this order.

from *Holliday v. Brown*, 33 Neb. 657, in which it appears that the wife was not present, and knew nothing of the attempted service of the summons upon her. If the actual delivery into the hand of a defendant is necessary to constitute personal service, one might effectively and forever avoid service of process by refusing to disclose her true name, and by refusing to take a copy of a summons into her hands.

* * * * *

We recommend that the judgment of the district court be reversed.

By the Court: For the reasons given in the foregoing opinion, the judgment of the district court is reversed and this cause remanded for further proceedings.

Reversed.

BOGGS V. INTER-AMERICAN MINING AND SMELTING COMPANY.

Court of Appeals of Maryland. 1907.

105 Maryland, 371.

SCHMUCKER, J., delivered the opinion of the Court.

The first of the cross appeals in this case is by William R. Boggs, the plaintiff below, from an order of the Superior Court of Baltimore City striking out upon terms a final judgment theretofore rendered in his favor against the Inter-American Mining and Smelting Company. * * *

The Mining Company was incorporated in the District of Columbia, but for some time prior to March 7th, 1906, its office, where its records were kept and from which its general business was transacted was in the Calvert Building in Baltimore, and during that time H. C. Turnbull, Jr., who did business in Baltimore City and resided in Baltimore County, was president of the corporation. During the time that the company was thus located in Baltimore City, its president, purporting to act in its behalf, employed the plaintiff, Boggs, as a mining engineer at a salary of \$200 per month and personal and traveling expenses.

On May 28th, 1906, Boggs sued the company in the Superior Court to recover his salary and expenses for October, November, and December, 1905, and January, 1906, amounting in the aggregate to \$1,188. The suit was brought under and in conformity to the Rule Day Acts in force in Baltimore City, and the defendant having been returned summoned, and having failed to appear to the action or plead, judgment by default was entered against it on June 27th, 1906. On the same day the judgment by default was duly extended for \$1,188 and costs.

* * * * *

* * * * * P. M. Gober, a deputy sheriff of Baltimore City, then testified that having been directed to serve the writ in the case upon Mr. Turnbull he went over to the Calvert Building and asked Turnbull if he was one of the officers of the company, and he replied that he was not, but had formerly been its president. To the best of witness' recollection Turnbull said that he knew the plaintiff Boggs and would like to see him get what was due him. The deputy reported this interview to the sheriff, who told him to serve the writ on Turnbull, as he was one of the directors and the deputy went back to do it but Turnbull shut the door in his face and would not let him serve it. The deputy further swore that he explained his object to Mr. Turnbull and the latter saw the writ, and said he was doing what he could to get Mr. Boggs righted in the matter, or something to that effect. He, the deputy, did not read the writ to Mr. Turnbull, but he explained it to him and Turnbull looked at the writ.

Thatcher Bell, another deputy sheriff, testified that he was told by the sheriff to go over to the Calvert Building and serve the writ on Mr. Turnbull, that Gober had not been able to get a service. Witness went over to Turnbull's office with the copies ready to serve and said to Turnbull, "I have a paper to serve on you." Turnbull said, "I know what you have," and started to go out. Witness reached for Turnbull with the copies and when the latter kept running, he commenced to read them, but Turnbull got into the next room and slammed the door. Witness then laid the copies on the table and returned to the sheriff's office. He left the copies of the *narr.*, notice to plead, and writ in this case on the table in Turnbull's office. Mr.

Turnbull was put on the stand and his account then given of the views of the two deputy sheriffs to him substantially corroborated their testimony except he denied that he said to the deputy Bell that he knew what he had or that he (Turnbull) saw or looked at the writ. There was also evidence tending to show that Mr. Turnbull never reported the service of the writ on him to the company or took any steps himself looking to a defense of the action, and that the motion had been promptly made by the company when it learned of the suit and judgment.

Assuming that Turnbull was a proper person upon whom to serve the writ and other papers, we are indisposed to consume much time in discussing the sufficiency of the service. It is apparent from the evidence that Turnbull was fully informed as to the institution of the suit by Boggs against the company and the desire of the sheriff to summon the company by serving the papers on him as one of its directors and knew that the deputy was about to make that service when he attempted to elude him and evade the service by running out of the room and slamming the door in the officer's face. Neither he nor the company he represented, if he did represent it for the purpose of the service, can be permitted to set up such a state of facts in support of the motion to strike out the judgment. He might as well have remained in his office and put his fingers in his ears while the deputy read the writ to him, and then claim to be without information as to its contents or purpose. Defendants have frequently sought to evade or defeat service of process upon them by flight or refusal to accept the process handed them by the serving officer but the courts have held such efforts futile. *Davison v. Baker*, 24 How. Prac. 42; *Slaught v. Robbins*, 13 N. J. L. 349; *Borden v. Borden*, 63 Wis. 377; *Baker v. Carrecton*, 32 Me. 334.

The laws of this state do not prescribe precisely how a summons shall be served upon an individual defendant. The service must be a personal one, 2 Poe, Pleading and Practice, section 62, but the sheriff is not *required* to read the writ to the defendant, although it is usual for him to read it or explain its nature and leave a copy of it with the person served. Secs. 409 to 412 of Art. 23 of the Code provide for service of process upon corporations.

* * * * *

* * * * * The court below in our opinion acquired jurisdiction over the defendant in this suit by the service of the process upon its resident director, Mr. Turnbull.

* * * * *

Order striking out the judgment reversed with costs.

SECTION 2. SUBSTITUTED SERVICE.

BARWICK V. ROUSE.

Supreme Court of Florida. 1907.

53 Florida, 643.

COCKRELL, J.: The action is in assumpsit on promissory notes and the return of the sheriff upon the summons *ad respondendum* is as follows: "The within summons came to hand this 21st day of February, 1906, J. W. Smith, sheriff, and executed on the 22nd. day of February, 1906, by delivering a true copy on Mrs. Melvina Barwick, the wife of the within named James M. Barwick, this 24th day of February, 1906. J. W. Smith, Sheriff of said Wakulla county, Fla." The summons was returnable March 5, 1906, on which day a default for want of appearance was entered, reciting that service was had February 24th. On the April rules, no alias summons having been issued, a judgment final was entered reciting that the defendant had failed to appear at the March rules, and had further failed to plead, answer, or demur.

The question, therefore, is, does the return of the sheriff show sufficient service upon James M. Barwick, to bring him into court *in invitum*, there being no amendment or offer to amend the return and there being nothing in the return of a voluntary appearance? As ancillary thereto it may be asked if the defects are such as to avail upon this appeal.

Undoubtedly if the actual date of the service on Mrs. Barwick was the 24th day of February. as recited by the clerk, it was too late for the return day of the summons, it

not being "served at least ten (10) days before the rule day." This, however, is not a fair construction of the language; it is evident that the service was made on the 22nd., while the return was endorsed on the 24th.

The serious defect, however, is in the statement of the manner and place of service. The statute, Revised Statutes of 1892, section 1015, provides that "service of the original writ or summons shall be effected by reading the writ or summons to the person to be served or by delivering him a copy thereof or leaving such copy at his usual place of abode with some person of the family above fifteen years of age, and informing such person of the contents thereof." A cursory inspection of the return will disclose several particulars wherein this statute was not complied with. Service was not made upon the person to be served, but a copy was delivered to his wife; where such copy was delivered does not appear; *non constat* the sheriff may have met her in Georgia, where she was living apart from her husband, and not "at his usual place of abode in Wakulla county, Florida, with some person of his family above fifteen years of age." It does not necessarily follow that because Mrs. Melvina Barwick is the wife of James M. Barwick that she is a member of his family at his usual place of abode and above fifteen years of age. Again, when another than the defendant himself is served, the law is not satisfied by merely delivering a true copy of the writ. It is further required that such other person be informed of the contents thereof. This provision is not mere idle words, but is founded wisely, and must be given effect.

We do not intend to hold that every criticism we have made upon this return is separately to be taken as a decision that the defect pointed out would necessarily render the judgment void upon collateral attack, but there is a duty upon those charged with the entry of judgments before a clerk to see that there has been at least substantial compliance with the statute necessary to bring the defendant into court. We do hold that the return here is fatally defective and that the judgment based thereon will be set aside.

The defendant has, however, subjected himself to the jurisdiction of the court by prosecuting this writ of error, and further process is as to him unnecessary.

The other assignments will not be considered.

The judgment is reversed.

SHACKLEFORD, C. J., and WHITFIELD, J., concur.

TAYLOR, HOCKER, and PARKHILL, JJ., concur in the opinion.

SECTION 3. CONSTRUCTIVE SERVICE.

HARNESS V. CRAVENS.

Supreme Court of Missouri. 1894.

126 Missouri, 233.

The plaintiff lived in Barton county; had lived there some seventeen years, having previously lived in Newton county five years or more on a farm, all in cultivation. That farm consisted of a piece of ground, to-wit: The southwest quarter of the northeast quarter, and the west half of the southeast quarter, less ten acres off the west side thereof (seventy acres) all in section 7, township 24, range 29. The portion in litigation is the seventy acres, which has a house and orchard on it.

* * * * *

In March, 1889, Harness paid the taxes on the land for the year 1888, and took a receipt therefor, from Gracy, the collector in the tax suit controversy, and when in the collector's office on that occasion, Harness says he "called for all the taxes against the land." That suit was begun September 14, 1889, and was for the taxes on the land for the year 1886, a duly certified tax bill accompanying the petition, which alleged defendant to be a non-resident of the state. An affidavit as to non-residency was also made.

On the filing of the petition a *summons* was issued, and the sheriff having returned *non est* on the writ, publication was made, etc. Judgment was rendered in the suit thus instituted, July 11, 1891. Execution was issued August 24, 1891, and on September 24 next thereafter a sale of the land in controversy occurred, at which the defendant became the purchaser at the price of twenty-five dollars.

* * * * *

On hearing of the sale of his land, plaintiff applied to defendant for permission to redeem it, but defendant refused to do so, whereupon plaintiff instituted the present proceeding, in January, 1892, to cancel the sheriff's deed made to defendant as aforesaid, as a cloud on plaintiff's title and for other and further relief.

* * * * *

SHERWOOD, J.—1. As appears from the record in this cause, the plaintiff herein, the defendant in the back tax suit, was proceeded against as a *non-resident* of the state. The petition alleged his non-residence and so did the accompanying affidavit. But, instead of taking out an *order of publication* before the clerk in vacation as authorized by section 2022, Revised Statutes, 1889, a *summons* was issued to Harness returnable to the next November term. That summons was returned *non est*, October 25, 1889. This *non est* return was followed by an order of publication based on that return, and then judgment by default took place at the May term, 1891, followed by a sale and sheriff's deed to defendant Cravens, September 24, 1891.

As will be seen by sections 2013 and 2023, Revised Statutes, 1889, a summons in such cases is only authorized to issue against a *resident* defendant. And it is provided in section 2024 that when summons has been properly issued and return of *non est* made thereon, then the court, being first satisfied that the defendant cannot be found, makes an order of publication as required in section 2022. Of course such an order of publication made in the circumstances mentioned would recite, among other things, the issuance of the summons, and the fact that the defendant *could not be found*, etc.; because the court could not make this class of publication unless "*in conjunction with the return*," and it must be "*founded thereon*." *State ex rel. v. Finn*, 87 Mo. 310.¹

¹The statutes involved are as follows: "Sec 2022. *Orders of Publication*.—In suits in partition, divorce, attachment, suits for the foreclosure of mortgages and deeds of trust, and for the enforcement of mechanics' liens, and all other liens against either real or personal property, and in all actions at law or in equity, which have for their immediate object the enforcement or establishment of any lawful right, claim or demand to or against any real or personal property within the jurisdiction of the court, if the plaintiff or other person for him shall allege in his petition, or at the time of filing the same, or at any time thereafter shall file an affidavit stating, that part or all of the defendants are not residents of the state, or is a corporation of another state, kingdom or country, and cannot be served in this state in the manner

So that here we have presented a defendant sued as a *non-resident*, summons issued against him as a *resident*, and publication issued against him as a resident *who could not be found*. In short, the order of publication was a clear departure from the allegations of the petition and affidavit. The issuance of the summons was, therefore, unwarranted by the statute, and the publication, being based thereon, necessarily partook of the writ's inceptual infirmity, and this is so, because, in the language of Mr. Justice FIELD, "the court is not authorized to exert its power in that way." *Windsor v. McVeagh*, 93 U. S. 283.

This doctrine is abundantly established, that, where a mode of securing jurisdiction differing from that of the common law is prescribed by statute, nothing less than a rigid and exact compliance with the statute is an indispensable requisite to obtaining jurisdiction, 1 Elliott's Gen. Prac., sec. 247. Thus in *Granger v. Judge*, 44 Mich. 384, CAMPBELL, J., says:

"Where cases and proceedings are not according to the usual course, and are special in their character, they are held void on slighter grounds than regular suits, because the courts have not the same power over their records to correct them. So, where there has been no personal service within the jurisdiction, the doctrine prevails that proceedings not conforming to the statutes are void. But this is on the ground that there has been no service whatever, and the party, therefore, has not been notified, in any proper way, of anything. The purpose of the statutory

prescribed in this chapter, or have absconded or absented themselves from their usual place of abode in this state, or that they have concealed themselves so that the ordinary process of law can not be served upon them, the court in which said suit is brought, or in vacation the clerk thereof, shall make an order directed to the non-residents or absentees, notifying them of the commencement of the suit, and stating briefly the object and general nature of the petition, and, in suits in partition, describing the property sought to be partitioned, and requiring such defendant or defendants to appear on a day to be named therein and answer the petition, or that the petition will be taken as confessed. If in any case there shall not be sufficient time to make publication to the first term, the order shall be made returnable to the next term thereafter, that will allow sufficient time for such publication.

"Sec. 2023. *Process against resident defendants*.—If in such case, part or the defendants are residents of the state, process shall be issued against them as in other cases.

"Sec. 2024. *Publication to issue on return of non est*.—When, in any of the cases contained in section 2022, summons shall be issued against any defendant, and the sheriff to whom it is directed shall make return that the defendant or defendants cannot be found, the court, being first satisfied that process cannot be served, shall make an order as is required in said section."

methods is to furnish means from which notice may possibly or probably be obtained. But, as a court acting outside of its jurisdiction is not recognized as entitled to obedience, the special statutory methods stand entirely on their own regularity, and, if not regular, cannot be said to have been conducted under the statutes. The distinction is obvious and is not imaginary."

In a case which arose in Alabama, BRICKELL, C. J., observes: "The statute not only defines the cases in which the court may take jurisdiction of non-resident or absent defendants, but it appoints and orders the mode of proceeding against them, and declares the effect of the decree rendered, if they do not appear and defend. The jurisdiction and authority, like all jurisdiction and authority derived from, and depending upon statute, must be taken and accepted with all the limitations and restrictions the statute creating it may impose. These restrictions and limitations the courts are bound to observe; they cannot be dispensed with, however much they may seem to embarrass, or however unnecessary they may seem to be in the administration of justice in particular cases. The statute is in derogation of the common law, is an essential departure from the forms and modes a court of equity pursues ordinarily, and must be strictly construed. Proceedings under it must be closely watched, or it may become an instrument for the infliction of irreparable wrongs upon defendants to whom notice is imputed by construction." *Sayre v. Land Co.*, 73 Ala. 85.

On this point, Wade says: "As this manner of serving process depends for its validity more upon its strict conformity to the statute by which it is authorized than upon any inherent probability of its conveying intelligence of the impending suit to the party whose rights are to be affected, the fact that it has actually come to the knowledge of defendant cannot be shown to supply any material deviation in the publication from what the statute prescribes. The statute, being in derogation of common law, is always strictly construed," Law of Notice (2 Ed.) sec. 1030.

This is the well settled doctrine of this court, as shown in numerous instances. Thus, in *Stewart v. Stringer*, 41 Mo. 400, it was ruled that where the statute provides for constructive service of process, the terms and conditions

prescribed for such service must be strictly complied with.

A striking exemplification of this principle is afforded by *Schell v. Leland*, 45 Mo. 289. There, the statute, 2 Wagner's Stat., p. 1008, sec. 13, was the same as section 2022, *supra*. There, the plaintiff, seeking to enforce a mechanic's lien, filed his petition and had summons issued in the ordinary way, which was returned *non est*. Thereupon he made affidavit before the clerk in vacation, of the defendant's non-residency, who, on such affidavit, issued an order of publication which was followed by a judgment. Speaking of this proceeding and of its insufficiency, WAGNER, J., observed: "The order can only be made by strictly complying with the statute; for, in all cases where constructive notice is substituted for actual notice, strict compliance is required. The section contemplates and directs that the facts which authorize the publication shall be either stated in the petition, or an affidavit embodying them shall be filed at the commencement of the suit. This was not done in this case, and, therefore, no order was allowable in vacation under the foregoing section. The fifteenth section of the same act enacts that when, in any of the cases contained in the thirteenth section, summons shall be issued against any defendant, and the sheriff to whom it is directed shall make return that the defendant or defendants cannot be found, the court, being first satisfied that process cannot be served, shall make an order as required in the thirteenth section. But this section gives no countenance to the proceeding in the case at bar. It does not authorize an order of publication in vacation at all, but intends that it shall be made by the court at the regular return term. I conclude, therefore, that the publication was a nullity."

It will be noticed that the principal difference between the case just instanced and the one at bar, is that there the summons was issued *first*, returned *non est* and followed by the affidavit and publication, while here, the affidavit was made first, followed by the unauthorized issuance of the summons, return thereon, etc.

In *Quigley v. Bank*, 80 Mo. 289, an order of publication was held invalid because the affidavit against unknown parties, under the provisions of section 3499, now section 2027, was sworn to by the *attorney* for plaintiff, instead of by the *plaintiff himself*, that section requiring that the

plaintiff should make the oath, therein differing from section 2022, where the oath may be made by the "*plaintiff or some person for him*," which difference was in that case pointed out.

So in *State ex rel. v. Staley*, 76 Mo. 158, where the petition did not set forth the interests of the unknown parties, nor did the order of publication do so, as required by section 2027, it was ruled that, in consequence, no jurisdiction was acquired over such unknown parties.

In *Charles v. Morrow*, 99 Mo. 638, a similar ruling was made in similar circumstances on the same section of the statute last aforesaid, and the principle was there reiterated that, "In all cases where constructive or substituted service is had in lieu of that which is personal, there must be a strict compliance with statutory provisions and conditions."

The more recent case of *Wilson v. Railroad*, 108 Mo. 588, confirms the views on this subject heretofore expressed in other cases: "Mere notice of service, not according to law, brings no one into court, nor does mere knowledge on the part of the party notified, of the pending proceedings have any more valid effect. *Potwine's Appeal*, 31 Conn. 381; *Smith Merc. Law*, 322."

* * * * *

It cannot be doubted that the lower court would have been justified in disregarding the issuance and return of the summons, and in proceeding to order publication on the allegation of non-residency; this it did not do; its whole action was based on the writ and its return, which course was wholly unsanctioned by the statute. On the contrary, right in the teeth of the allegations of non-residency contained both in the petition and affidavit, the trial court made an order of publication adapted alone to the case of a *resident* who cannot be found.

It will not do to say that the unauthorized order of publication would be *just at likely to apprise the then defendant of the suit against him as if he had been proceeded against according to the specific method prescribed by law*, because if this were all that is required, then a printed *circular* or *letter* sent out by the clerk would answer the end and accomplish the purpose just as well. The *test is*, was the *method* used in the given instance the *one pre-*

scribed by the statute? If the answer is in the negative, that answer, without more, condemns the method employed, and announces its nullity. Whether that method actually notified the party, is of no importance whatever. The end of the law has been attained when, and only when, its forms have been observed. Wade on the Law of Notice, and Brown on Jurisdiction, *supra*.

Of course, if the order of publication, by reason of the facts aforesaid, is to be deemed invalid, then the judgment grounded thereon must share the same fate and fall with it. And the writ of summons and the order of publication being part of the record, are competent witnesses of that judgment's invalidity, and by them it can be impeached collaterally. *Laney v. Garbee*, 105 Mo. 355, and cases cited; *Russell v. Grant*, 122 Mo. 161.

Since the judgment thus rendered must be regarded as null, of course the defendant acquired no title in consequence of the sale which occurred under the execution which issued on the judgment. 1 Freem. on Judgments, section 117. On this ground alone, the decree should be affirmed.

[GANTT, P. J., filed a dissenting opinion.]

D'AUTREMONT V. ANDERSON IRON CO.

Supreme Court of Minnesota. 1908.

104 Minnesota, 165.

BROWN, J.

Proceedings to register title to real property under the Torrens system of land transfer. Respondent Gaylord had judgment confirming an asserted interest in the land, and applicants appealed.

* * * * *

The sole question involved is whether the court acquired jurisdiction of George W. Leslie in the partition suit * * * The summons in that action was served by publication, and, as already mentioned, designated "George H. Leslie" as defendant. It is the contention of appellant that the error in the name, the use of the initial "H" instead of "W",

was an irregularity not going to the jurisdiction of the court; while respondent contends that the error was fatal, and the publication of the summons conferred no jurisdiction upon the court to adjudicate the rights of "George W. Leslie." * * * * And we have for consideration the question whether the publication of the summons in the form stated was a valid service thereof upon "George W. Leslie," the real party in interest.

As a general rule the common law recognizes but one Christian name, and failure in judicial or other proceedings in giving the name of the party to state his middle name, or the initial thereof as commonly used, is not fatal to their validity. But the rule, like most rules of judicial procedure, is not without exceptions. *Stewart v. Colter*, 31 Minn. 385, 18 N. W. 98; *State v. Higgins*, 60 Minn. 1, 61 N. W. 816, 27 L. R. A. 74, 51 Am. St. 490. It had its origin during the early times in England, when a person had but one name, and that his Christian name. His further identification was indicated by some designated physical characteristic, place of residence, or deed of valor or virtue. Even since the adoption of the system of family names, the first or Christian name has been held by the courts of England as the true name, in legal proceedings, for the designation of persons; the middle name or the initial thereof, being regarded as wholly unimportant. The rule has been followed and applied in proceedings both judicial and extrajudicial in this country, with occasional exceptions based upon special circumstances.

In all proceedings where an error in the name may be corrected by appropriate application to the court, or the particular person may be identified by extrinsic evidence, a mistake in the name appearing in the proceeding or writing involved is not ordinarily fatal to its validity. Our statutes, as do the statutes of nearly all the states of this country, provide for the correction of mistakes in the names of parties in judicial proceedings. R. L. 1905, Sec. 4157; *Casper v. Klippen*, 61 Minn. 353, 63 N. W. 737, 52 Am. St. 604; *Kenyon v. Semon*, 43 Minn. 180, 45 N. W. 10. In respect to similar mistakes in conveyances of land, mortgages, contracts, or statutory proceedings for the foreclosure of mortgages, the rules of evidence permit the full and complete identification of parties misnamed by error

or mistake. *Massillon E. & T. Co. v. Holdridge*, 68 Minn. 393, 71 N. W. 399; *Ansley v. Green*, 82 Ga. 181, 7 S. E. 921. Of course, to authorize such amendments in judicial proceedings, the court must have jurisdiction of the parties and afford them an opportunity to be heard, and in other proceedings those interested in the subject-matter must also be before the court, with opportunity to be heard on the question of identity.

It has often been held that the failure in any proceeding, judicial or otherwise, to include the initial of the middle name is unimportant, and not fatal to its validity. *Cleveland v. Peirce*, 34 Ind. App. 188, 72 N. E. 604; *State v. Hughes*, 31 Tenn. 261; *King v. Clarke*, 7 Mo. 269. The rule has been declared otherwise, however, where a wrong initial is used, particularly in deeds or other instruments affecting the title to land. *Amb's v. Chicago, St. P. M. & O. Ry. Co.*, 44 Minn. 266, 46 N. W. 321; *Burford v. McCue*, 53 Pa. St. 427. And there has been a tendency in some of the courts to break away from the old rule, and to hold the full true name of all parties essential in all proceedings. *Parker v. Parker*, 146 Mass. 321, 15 N. E. 902; *Com. v. Buckley*, 145 Mass. 181, 13 N. E. 368; *Dutton v. Simmons*, 65 Me. 583, 20 Am. Rep. 729; *Ming v. Gwatkin*, 6 Rand. (Va.) 551; *Bowen v. Mulford*, 10 N. J. L. 230. In most states it is held, in both civil and criminal actions, that an omission or the use of a wrong initial does not affect the jurisdiction of the court, where the right party is actually served with process and brought into court. *Casper v. Klippen*, 61 Minn. 353, 63 N. W. 737, 52 Am. St. 604; 14 Enc. Pl. & Pr. 301, and cases cited.

There is reason and sound sense in that view of the law. In such case the right party is actually served, and the error may be corrected without prejudice to any of his rights. Only an extremely technical view sustains the position that in such cases the error is fatal. *Casper v. Klippen*, *supra*, overruling *Atwood v. Landis*, 22 Minn. 558. But should the same liberal view be taken where the defendant is only constructively served with summons, as in the case at bar, by publication? We think not.

The reasons for disregarding the error where there is personal service upon the right party do not apply where the only service is by publication against a non-resident of

the state. In a case of that kind the true name of the party becomes of especial importance. It is well known that there are numerous persons having the same christian and surname, but with a different middle name, such as John O. Johnson, John A. Johnson, and John M. Johnson, James A. Green and James E. Green, and they are each identified and distinguished by the initial of the middle name. It would be intolerable in the practical affairs of life if persons by the name of Johnson, Green, or Brown, or even the numerous Jones family, should be required to take notice of every action brought by the publication of summons in which a part of his name appeared as the party defendant. No personal service is made in such cases, and that the real defendant has knowledge of the pendency of the action is an inference of the law only, and the use of a wrong initial is naturally misleading and likely to result to his prejudice. The statute authorizing this form of process is in derogation of the common law, and the mode prescribed must be strictly pursued. *Reno, Non-residents*, Sec. 190; *Gilmore v. Lampman*, 86 Minn. 493, 90 N. W. 1113, 91 Am. St. 376; *Duxbury v. Dahle*, 78 Minn. 427, 81 N. W. 198, 79 Am. St. 408. This method of acquiring jurisdiction and adjudicating the rights of parties constitutes due process of law only when the statutes providing therefor have been fully and completely complied with. *Corson v. Shoemaker*, 55 Minn. 386, 388, 57 N. W. 134; *Clary v. O'Shea*, 72 Minn. 105, 75 N. W. 115, 71 Am. St. 485.

Some of the courts have held that the use of a wrong initial, or other error in defendant's name, not coming within the rule of idem sonans, where the summons is served by publication, is not a compliance with the statute, and is fatal to the jurisdiction of the court. 66 Cent. Law. J. 338; 14 Enc. Pl. & Pr. 302, and cases cited in note; *Cleveland v. Peirce*, 34 Ind. App. 188, 72, N. E. 604; *State v. Hughes*, 31 Tenn. 261; *King v. Clarke*, 7 Mo. 269; *Fanning v. Krapfl*, 61 Iowa 417, 14 N. W. 727, 16 N. W. 293; *Enewold v. Olsen*, 39 Neb. 59, 57 N. W. 765, 22 L. R. A. 573, 42 Am. St. 557; *Skelton v. Sackett*, 91 Mo. 377, 3 S. W. 874; *Freeman v. Hawkins*, 77 Tex. 499, 14 S. W. 364, 19 Am. St. 769; *Fitzgerald v. Salentine*, 51 Mass. 436; *Parker v. Parker*, 146 Mass. 320, 15 N. E. 902; *Davis v. Steeps*, 87 Wis. 472, 58 N. W. 769, 23 L. R. A. 818, 41 Am. St. 51; 1 Black on

Judgments, Sec. 232. The cases just cited are not all precisely in point, but they are analogous, and bear out the claim that a service by publication, where there is a substantial error in the name of the defendant, confers no jurisdiction on the court. We are not prepared to say that the mere omission of the middle name, or the initial thereof, would wholly nullify the proceedings; but where, as in this case, there is an attempt to give the full name of the defendant, and a wrong initial is used, it must, in view of the very common practice of identifying particular individuals by adding their middle name, be held that the error is misleading, and likely to result in prejudice to those who may perchance notice the same as published in the newspaper. It would be straining the rule requiring a strict observance of the statute permitting service of process in this manner to hold an error so likely to mislead and prejudice an irregularity only.

As bearing upon the question of jurisdiction, numerous instances are reported in the books where errors and defects of far less significance than the one here presented have been held to wholly vitiate a judgment based upon this form of constructive service. In *Barber v. Morris*, 37 Minn. 194, 33 N. W. 559, 5 Am. St. 836, and *Brown v. St. Paul & N. P. Ry. Co.*, 38 Minn. 506, 38 N. W. 698, judgments were held void on collateral attack for the failure of the plaintiff to file his affidavit for publication within the time prescribed by statute. In the first of these cases the affidavit was not filed until the day of the entry of judgment. In the second case, a condemnation proceeding, the affidavit was not filed until after the summons had been published. An affidavit filed two days after the first publication was held insufficient in *Murphy v. Lyons*, 19 Neb. 689, 28 N. W. 328. If the affidavit be technically, in point of substance, not in compliance with the statute, a judgment rendered on service by publication is void. *Carrico v. Tarwater*, 103 Ind. 86, 2 N. E. 227, where the affidavit fails to show that the action is one in which service by publication is authorized; *Harris v. Clafin*, 36 Kan. 543, 13 Pac. 830; *Nelson v. Roundtree*, 23 Wis. 367; *Forbes v. Hyde*, 31 Cal. 342. Insufficiently specific as to due diligence in ascertaining the residence of the defendant. *Little v. Chambers*, 27 Iowa, 522. In Illinois the statute requires the issuing and return of process

“not found” before publication, and a judgment rendered upon such service without the return was held void in *Chickering v. Failes*, 26 Ill. 507, and also in *Firebaugh v. Hall*, 63 Ill. 81. If the affidavit be not made by all the plaintiffs, where two or more join in bringing the action, the judgment rendered is void. *Kane v. Rock River Canal Co.*, 15 Wis. 179; *Mecklem v. Blake*, 19 Wis. 397. And also where the sheriff fails in observance of the statutory requirement to continue in an effort to find the defendant in the state pending publication. *Israel v. Arthur*, 7 Colo. 5, 1 Pac. 438; *Kennedy v. Lamb*, 182 N. Y. 228, 74 N. E. 834, 108 Am. St. 800. And where the summons is defectively addressed to the defendant. *Durst v. Ernst*, 45 Misc. 627, 91 N. Y. Supp. 13. See also, Van Fleet, Collateral Attack, sections 331, 348; 6 Current Law, 1090, and cases cited.

There is a conflict in the adjudicated cases upon the question whether defects of the nature of those here mentioned are jurisdictional. Many courts hold to the doctrine that a judgment rendered in the face of such defects is not rendered absolutely void, but irregular, and that the irregularity may be corrected by motion. But the two Minnesota cases above referred to settle the rule in this state, and are in harmony with the general principle that to confer jurisdiction in cases of this kind the statutes must be strictly complied with. 1 Black, Judg. Sec. 232.

But we need not pursue this subject. Reference is made to it only to emphasize the importance given by many courts to errors and defects in the proceedings leading up to the service of summons by publication. The affidavit of publication in such cases is not filed, nor required to be filed, for the information of the defendant. He receives no benefit therefrom by way of notice of the suit or otherwise, nor by the sheriff's certificate of “Not found,” nor from the order for publication, where an order is required; and if a judgment rendered on service by publication is void for want of jurisdiction, for errors in these respects, and in others pointed out in the decisions referred to, for a stronger reason should the error of misnaming defendant be fatal, where the error does not come within the rule of *idem sonans*, and is such as is likely to mislead and result in his prejudice.

In *Amb's v. Chicago, St. P. M. & O. Ry. Co.*, 44 Minn. 266.

46 N. W. 321, it appeared that the land there in question was at one time conveyed to "William H. Brown," and the chain of title disclosed a subsequent conveyance from "William B. Brown." The court there held, JUDGE DICKINSON writing the opinion, that there was no presumption that the two Browns were one and the same person. If that be sound as to private writings, and we have no reason to question the decision, it follows naturally that the same rule should be applied to a judicial proceeding like that at bar, and, if so, we have no right to assume that "George W. Leslie" and "George H. Leslie" are one and the same person.

It is urged by appellant that inasmuch as, in cases where the summons in an action is served by publication, the defendant, may, upon good cause shown, which has been construed as an answer stating a defense, come in and defend the action within a year after notice of its entry, the court should be more liberal in the consideration of errors of the character of those here involved, citing *Quarle v. Abbet*, 102 Ind. 233, 1 N. E. 476, 52 Am. Rep. 662. But we are not persuaded by this argument. If the error in the name is jurisdictional, as we hold, judgment entered is void, and to adopt the contention of appellant would result in compelling a defendant in a particular case to waive the want of jurisdiction in the court to enter judgment against him, and to come to this state and litigate the cause on its merits. This the court has no right to do. The law providing for the manner of acquiring jurisdiction over non-residents is plain, and should not be ignored, even in a case of apparent hardship. We are sustained in this view by the Supreme Court of Michigan in the case of *Granger v. Judge*, 44 Mich. 384, 6 N. W. 848, where the court speaking through JUSTICE CAMPBELL, said, "Where cases and proceedings are not according to the usual course, and are special in their character, they are held void on slighter grounds than regular suits, because the courts have not the same power over their records to correct them. So where there has been no personal service within the jurisdiction, the doctrine prevails that proceedings not conforming to the statutes are void. But this is on the ground that there has been no service whatever, and the party therefore has not been notified in any proper way of anything."

Counsel called attention to the case of *Illinois v. Hasenwinkle*, 232 Ill. 224, 83 N. E. 815. While the court in that case in the course of the opinion said that the use of a wrong initial of the middle name of a non-resident defendant in condemnation proceedings would not necessarily render the judgment therein void, the real ground of the decision there made was that the defendant, so erroneously named, had permitted the judgment to remain unquestioned for over fifty years during which time the railroad company had occupied the premises granted by the judgment as its right of way.

We therefore hold, in harmony with the views of the learned trial court, that the publication of the summons in the partition suit directed to "George H. Leslie" did not confer jurisdiction upon the court to adjudicate the rights of "George W. Leslie."

Judgment affirmed.

NELSON V. THE CHICAGO, BURLINGTON & QUINCY
RAILROAD CO.

Supreme Court of Illinois. 1907.

225 Illinois, 197.

MR. JUSTICE HAND delivered the opinion of the court.

The appellant, Lars R. Nelson, on the 21st day of April, 1906, filed a *praecipe* in the office of the clerk of the Circuit Court of Kane county for a summons in an action on the case against the Chicago, Burlington, & Quincy Railway Company, an Iowa corporation, and the Chicago, Burlington & Quincy Railroad Company, an Illinois corporation. A summons was issued against both companies and delivered to the sheriff of said county to serve, which summons was returned by said sheriff not served as to the railroad company, because the president or any other of the officers or agents of said railroad company with whom the statute provides a copy of the summons may be left to effect service of process on the company, could not be found by him in said county. The *praecipe* and summons were then

amended and the case discontinued as to the railway company, and the railroad company was served with process by publication and mail, as in chancery cases, as is authorized by paragraph 5 of the Practice Act, (Hurd's Stat. 1905, Chap. 110), and a declaration was filed against the railroad company.

* * * * The railroad company entered a special appearance and moved to quash the service of process had upon it by publication and mail, which motion was sustained, and the appellant electing to stand by the service of process and refusing to proceed further, the court dismissed the suit, and the appellant has prosecuted this appeal.

It is * * * contended by the railroad company that * * * if service of process by publication and mail is authorized by said paragraph 5 upon a defendant railroad company that has its principal office in this state in a suit where a judgment *in personam* is sought against the railroad company, the statute is unconstitutional and void, as such service of process, it is said, does not constitute due process of law.

* * * * *

The law provides for two methods of service of process; the one actual and the other constructive. Actual service of process is made by reading the original process to the defendant or by delivering to him a copy thereof; and constructive service of process, which is a substituted service of process, is made by leaving a copy of the process at the defendant's residence when he is absent, or by posting or publishing notice of the pendency of the suit, and mailing a copy of the notice posted or published to the defendant, if his postoffice address is known. It is held that the service of process, either actual or constructive, upon a non-resident defendant outside the limits of the state where the action or proceeding is pending will not authorize the rendition of a personal judgment or decree against a defendant, but that such service of process is sufficient upon which to base a decree changing the marital status in a proceeding for divorce, or a judgment or decree disposing of property situated within the jurisdiction of the court wherein the action or proceeding is pending. It is also held that each state may determine for itself in what

method process may be served upon its citizens within its own boundaries, and while such legislation will have no force outside the state, service of process within the state in the manner pointed out in the statute regulating the method of obtaining such constructive service of process, if the method of service of process provided for is such as to amount to due process of law, as these terms are used in the State and Federal constitutions, will be sufficient to authorize the courts of the State within whose jurisdiction the service of process is had to pronounce a personal judgment or decree against a defendant so served with process, although cases may arise in practice upon such constructive service of process where a personal judgment or decree might be obtained against a defendant without such defendant having received actual notice of the pendency of the action prior to judgment or decree. Constructive service of process, it is said, is authorized in a certain class of cases, such as when the defendant has gone out of the State, or when he cannot be found, or when he conceals himself so that process cannot be served upon him, as the result of necessity—that is, such constructive service of process is substituted for actual service of process when actual service of process cannot be had upon a defendant. In this case actual service could not be had upon the defendant although the suit was properly brought in the court from which the process was issued and the defendant was a resident of, and was in the State, and the question here is narrowed to this: Can the legislature provide a constructive or substituted service of process by publication and mail, in lieu of actual service of process, in a case where the process cannot be actually served upon the defendant in the county where the statute expressly authorizes the suit to be commenced, although the defendant resides and is in the State?

The case of *Bimeler v. Dawson*, 4 Scam. 536, was an action of debt upon a judgment rendered by the Court of Common Pleas of Stark county, in the State of Ohio, against Welch and Dawson. There was service of process upon Dawson only, and he pleaded *nul tiel record* and that he was not personally served with process. The record showed personal service upon Welch and service on Dawson by leaving a copy of the summons at his residence, and the rendition of a judgment by default against both de-

endants. The trial court held that for want of personal service upon Dawson the judgment was not evidence of indebtedness against him, and rendered judgment in his favor. Upon an appeal to this court the judgment was reversed, and in an opinion prepared by JUSTICE TREAT, on page 542, it was said: "The laws of the several states provide different modes of bringing parties into court. In some states personal service of process is required, while in other states that mode is not indispensable, but a party may be required to appear and defend an action on notice by publication or by the leaving of process at his residence. It is doubtless competent for each state to adopt its own regulations in this respect, which will be binding and obligatory on its own citizens. We can not doubt the right or power of the State of Ohio to provide that the kind of service which it appears was made in this case shall be sufficient to authorize its courts to take jurisdiction of the person of a defendant and proceed to hear the case and render judgment. A judgment thus rendered against one of its citizens would be binding and conclusive on him, for owing allegiance to the State, he is bound by its law and amenable to its judicial tribunals. That State, however, cannot in that way get jurisdiction over the people of other States. Its laws can only operate within its own territory and on its own citizens. They cannot be made to operate extra-territorially, or on the citizens of other States unless they go voluntarily within its limits."

And in *Welch v. Sykes*, 3 Gilm. 197, on page 201, it was said: "It is competent for each State to prescribe the mode for bringing parties before its courts. Although its regulations in this respect can have no extra-territorial operation, they are nevertheless binding on its own citizens."

In *Smith v. Smith*, 17 Ill. 482, on page 484, it was said: "A State may undoubtedly provide for bringing its own citizens or subjects before its tribunals by constructive notice, which may not in all cases come to the actual knowledge of the party; still the presumption is that he has actual notice, or might have such notice by the exercise of proper care and diligence."

* * * * *

What is due process of law in all instances is not easily

defined, but as applied to this case it clearly means proceeding according to the course of the common law, and the common law has from time immemorial required that a defendant be personally notified of the pendency of an action, if he was within the jurisdiction of the court and could be found, before judgment or decree was rendered against him. The common law, however, never required actual service of process in all cases, but has always provided for a constructive service of process when actual service thereof could not be had, such as the leaving of a copy of the summons at the defendant's residence, and latterly a posting or publishing of notice of the pendency of the suit or proceeding, when the defendant was out of the State or upon due inquiry could not be found, or when he concealed himself so that process could not be served upon him.

In *Bardwell v. Anderson*, 9 L. R. A. 152, the Supreme Court of Minnesota said (p. 154): "We think that from the earliest period of English jurisprudence down to the present, as well as in the jurisprudence of the United States derived from that of England, it has always been considered a cardinal and fundamental principle that in actions *in personam* proceeding according to the course of the common law, personal service (or its equivalent as by leaving a copy at his usual place of abode), of the writ, process or summons must be made on all defendants resident and to be found within the jurisdiction of the court. We do not mean that the term 'proceeding according to the course of the common law,' as used in the books, is to be understood as meaning, necessarily and always, personal or actual service of process, for although service by publication is of modern origin, there has always been some mode by which jurisdiction has been obtained at common law by something amounting to or equivalent to constructive service, where the defendant could not be found and served personally; but what we do mean to assert is, that the right to resort to such constructive or substituted service in personal actions proceeding according to the course of the common law rests upon the necessities of the case, and has always been limited and restricted to cases where personal service could not be made because the defendant was a non-resident, or had absconded, or had concealed himself for the purpose of avoiding service. As showing what means

were resorted to as amounting or equivalent to constructive service, and how strictly it was limited to cases of necessity by both courts of common law and courts of chancery, reference need only be had to 3 Blackstone's Com. 283, 444."

While the authorities are not in entire harmony upon the subject, the Illinois cases and the greater weight of authority clearly establish, we think, the proposition that a personal judgment in an action at law may be rendered against a defendant residing in and who is in the State where the suit or proceeding is pending, who has been notified of the pendency of the suit by constructive service of process, where it appears actual service of process could not be had upon the defendant, if the constructive service provided for was required to be had in such manner that the reasonable probability is that the defendant would receive notice of the pending action or proceeding before judgment or decree was rendered against him.

* * * * *

*Reversed and remanded.*¹

¹ In *Bardwell v. Collins*, (1890) 44 Minn. 97, 46 N. W. 315, quoted above in *Nelson v. Chicago, Burlington and Quincy Railroad Co.*, the statute authorized service of summons by publication, in actions to foreclose mortgages, as to all parties to the action against whom no personal judgment was sought. The court held (1) that such actions were not *in rem* but *in personam*, since they determined the rights and equities of the parties interested in the mortgaged premises; (2) that such actions were strictly judicial in character, proceeding according to the due course of the common law; (3) that it is a cardinal principle of "due process of law" that in actions in personam proceeding according to the course of the common law, personal service of process must be had upon defendants resident and to be found within the jurisdiction of the court; (4) the statute is unconstitutional in so far as it attempts to authorize service by mere publication upon resident defendants capable of being personally served.

KENNEDY V. LAMB.

Court of Appeals of New York. 1905

182 New York, 228.

VANN, J. The purchasers at the sale in this action, which was brought to partition lands in the borough of Brooklyn, refused to complete their purchase upon the ground that the title was defective. By an order, made at

Special Term and affirmed by the Appellate Division, they were directed to comply with the terms of sale and they now appeal to this court for relief from what they consider an unlawful command. They claim that the court which rendered the judgment in partition did not acquire jurisdiction of several persons, each a necessary party defendant, because they were not personally served with process and the effort to serve them by publication was void, owing to a vital defect in the affidavits upon which the order to publish was made.

From the affidavits presented to the justice who granted the order of publication, one made by the plaintiff and the other by his attorney, it appeared that six of the defendants resided in the State of New Jersey, four at Jersey City and two at Plainfield. The only attempt to show compliance with the command of the statute in reference to "due diligence to make personal service of the summons" was an allegation in the affidavit of the attorney that "the plaintiff will be unable with due diligence to make personal service of the summons within the State as appears by the affidavit of Peter J. Kennedy hereto annexed." The affidavit thus referred to contains nothing whatever upon the subject of diligence, discloses no effort to serve the summons in this state, and gives no reason for not making the effort, aside from the bare fact of non-residence. It does not appear that the summons had been issued or that it was placed in the hands of anyone for service upon the defendants named, and for aught that appears they could have been served in this state without difficulty. They were nephews and nieces of the plaintiff and had visited and corresponded with him "for several years past," as he stated in his affidavit. He did not state how recently they had visited him, when he last heard from them, nor where he himself resided. Four of them lived just across the state line and two of them but a short distance therefrom. All may have been engaged in business in the State of New York and in daily attendance there for that purpose, as is the case with so many residents of the State of New Jersey. The affidavit did not state that they were not in New York or that they were actually in New Jersey when the affiant swore to it.

An order may be made for service by publication upon a

defendant who is a non-resident of the state, provided "the plaintiff has been or will be unable with due diligence to make personal service" within the state. (Code Civ. Pro. Sections 438, 439.) The bare fact of non-residence is not enough to authorize the order, for the plaintiff must also show due diligence to make personal service, or state facts tending to show why personal service cannot be made. The statute now in force differs from the one which formerly governed the subject when some of the cases cited were decided, in that the latter authorized service by publication when the person to be served could not "after due diligence be found within the State." (Code of Pro. Section 135.) The old statute was satisfied with due diligence to find the defendant, while the present statute requires either due effort to serve, or sufficient reasons for not making the effort.

In the case now before us there was no attempt to make personal service and no reason was given for not trying to serve personally, except the fact of non-residence. Even if residence in a distant state or in a foreign country permits the inference that the person to be served cannot be found in this State, residence in an adjoining state, just across the line, with no evidence that the non-resident is not in business in this state, or that he does not sojourn here, and no explanation whatever for not trying to serve him here, is not sufficient. As was said by this court in *Carleton v. Carleton*, (85 N. Y. 313, 315): "It is a well known fact that many persons who are residents of one state have places of business and transact such business in a state different from that in which their residence is located. They are frequently in the latter state, and pass most of their time there. Such persons could be readily found in the state where they do business if due diligence was used for that purpose and non-residence, of itself, does not necessarily show that they cannot be found within the state, or raise a presumption that due diligence has been used, or that it was not required."

In a later case it was said: "Where the proof of non-residence is clear and conclusive, and that the defendant is living out of the state and in a distant state, there may be strong reasons for holding that proof of diligence is not required;" and as it appeared that the defendant resided

in Maryland, and that the summons, which had been duly issued and some effort made to serve it, could not be served owing to that fact, the affidavit was held sufficient. (*Kenedy v. New York Life Ins. & Trust Co.*, 101 N. Y. 487).

In *McCracken v. Flanagan*, (127 N. Y. 493), it appeared that a summons had been issued against the defendant and "that defendant is a non-resident of this state, nor can be found therein, but has a place of residence at Matewan, in the state of New Jersey." After a careful review of the leading cases it was held that the affidavit, which was made when section 135 of the Code of Procedure was in force, was insufficient to give jurisdiction. The court said: "Some degree of diligence must be exercised to find the party, and what is a due degree depends upon circumstances surrounding each case, and the simple averments in the affidavit that the defendant is a non-resident and cannot be found within the state are not alone sufficient to support an order for the service of a summons by publication. Those facts do not imply that any diligence has been exercised to find and serve the defendant personally with process. It needs no argument to show that the averment in the affidavit that the defendant cannot be found in the state does not tend to prove the exercise of due diligence to find the defendant, for the statute in question not only requires that it be stated in the affidavit that the defendant cannot be found, but expressly requires the averment that he cannot be found after due diligence."

In *Belmont v. Cornen*, (82 N. Y. 256), the order was sustained upon proof of non-residence, followed by an averment that the summons had been issued to the sheriff of the county where the premises, covered by the mortgage sought to be foreclosed, were situated; that the sheriff "had used due diligence to find the defendants and after such due diligence and inquiry they could not be found within said county or state."

In *Crouter v. Crouter*, (133 N. Y. 55) an affidavit was held sufficient which stated the non-residence of the defendants; that they had no place of business in this state; that plaintiff believed that a summons could not, with due diligence, be served personally within the state and that he had present knowledge of defendants' movements, and was satisfied that they frequent no place in the state.

In *Fetes v. Volmer*, (28 N. Y. St. Rep. 317), the court said: "Though a non-resident, the defendant may be at the time temporarily in the state to the knowledge of the plaintiff, and within easy reach of personal service of the summons. No such proof was made by the plaintiff in this case. The affidavit of his attorney, upon which the order was procured, states only that the action has been commenced, that a summons has been issued, and that the two defendants named are non-residents of the state and that they reside at Marion, Washington County, Iowa. The affidavit was, in this respect, plainly insufficient and the county judge was without jurisdiction to grant the order."

While any evidence having a legal tendency to show compliance with the statute, even if inconclusive, would warrant the exercise of judgment and thus confer jurisdiction to make the order, in this case there was no evidence as to the use of diligence, or to excuse the omission of effort to serve in this state. Even if a judge reached a wrong conclusion upon the facts presented, so that his order would be set aside on direct attack by motion to vacate, still if he had some legal evidence to act upon, the order would be protected from collateral attack after the entry of judgment. There was no evidence presented to the justice who made the order now before us which authorized him to act judicially or to decide that the plaintiff would be unable with due diligence to make personal service in this state. An affiant who simply repeats the words of a statute merely states his opinion upon a proposition to be proved. Proof requires that facts be stated from which the conclusion sought may be logically drawn. We find no case in this court and no well considered case in any court which sustains an order founded simply on proof of non-residence in an adjoining state with no effort made to find or serve, and no reason given why such effort if made would be useless.

The purchasers were entitled to a marketable title, free from reasonable doubt and they were justified in refusing to complete their purchase because the affidavits upon which the order of publication was based were insufficient to confer jurisdiction.

The order of the Appellate Division, as well as that of

the Special Term should be reversed and the motion denied, with costs in all courts.

CULLEN, Ch. J., GRAY, O'BRIEN, BARTLETT, HAIGHT and WERNER, JJ., concur.

Order Reversed.

SECTION 4. PLACE OF SERVICE.

WALLACE V. UNITED ELECTRIC COMPANY.

Supreme Court of Pennsylvania. 1905.

211 Pennsylvania State, 473.

Opinion by MR. JUSTICE BROWN, April 17, 1905.

The first prayer of appellant's bill is for full discovery. * * *

A decree for discovery is a personal one to be enforced against the person decreed to make it; and, if the appellee was properly brought within the jurisdiction of the court below personally, a decree that it make discovery could be enforced against it personally by the appellant as his first move to obtain the ultimate relief asked for. In view of this, the proceeding must, as was held by the learned judge below, be regarded as in personam as to the appellee; and the question whether the Act of April 6, 1859, P. L., 387, even if it does authorize extra-territorial service of process from a court of this state, is effectual to acquire jurisdiction over the person of a defendant residing and served in another state, is not an open one.

Before the passage of that act, Chief Justice Gibson, in discussing the attempt to acquire jurisdiction over the person of the defendant by the extra-territorial service of process, said in *Steel v. Smith*, 7 W. & S. 447: "Jurisdiction of the person or property of an alien is founded on its presence or situs within the territory. Without this presence or situs, an exercise of jurisdiction is an act of usurpation. An owner of property who sends it abroad subjects it to the regulations in force at the place as he would subject his person by going there. The jurisdiction of either springs

from the voluntary performance of an act, of whose consequences he is bound to take notice. But a foreigner may choose to subject his property, reserving his person; and it is clear that jurisdiction of property does not draw after it jurisdiction of the owner's person; consequently, there can be no rightful action by the tribunals on the foundation of jurisdiction acquired by the attachment of property, which reaches beyond the property itself. * * * * *

What, then, is the right of a state to exercise authority over the persons of those who belong to another jurisdiction, and who have, perhaps, not been out of the boundaries of it? 'The sovereignty united to domain,' says Vattel, 'establishes the jurisdiction of the nation over its territories or the countries which belong to it. It is its province, or that of its sovereign, to exercise justice in all places under its jurisdiction, or the country which belongs to it; to take cognizance of the crimes committed and the differences that arise in the country.' 'On the other hand,' adds Mr. Justice STORY (Conf. Ch. 14, § 539), no sovereignty can extend its process beyond its own territorial limits, to subject other persons or property to its judicial decisions. Every exertion of authority beyond these limits is a mere nullity, and incapable of binding such persons or property in other tribunals.' And for this he cites *Picquet v. Swan* (5 Mason, 35-42). Not to multiply authorities on a point so plain, it will be sufficient to add the name of Mr. Burge (1 Conf. 1), who says it is a fundamental principle, essential to the sovereignty of every independent state, that no municipal law, whatever its nature or object, should, proprio vigore, extend beyond the territory of the state by which it has been established.' And again (3 Burge Conf. 1044), 'that the authority of every judicial tribunal, and the obligation to obey it, are circumscribed by the limits of the territory in which it is established.' Such is the familiar, reasonable and just principle of the law of nations; and it is scarce supposable that the framers of the constitution designed to abrogate it between states which were to remain as independent of each other, for all but national purposes, as they were before the revolution. Certainly it was not intended to legitimate an assumption of extra-territorial jurisdiction which would confound all distinctive principles of separate sovereignty; and there evidently

was such an assumption in the proceedings under consideration." Speaking of the act of 1859, under which the court made the order for the extra-territorial service of process upon the appellee, SHARSWOOD, J., in *Coleman's Appeal*, 75 Pa. 441, in stating that it has not been the policy of our jurisprudence to bring non-residents within the jurisdiction of our courts, unless in very special cases, said: "In proceeding against them for torts, even property belonging to them cannot be reached by process, and in cases of contract nothing but the property can be affected unless the defendant voluntarily appear and submit to the jurisdiction. We may congratulate ourselves that such has been the policy, for nothing can be more unjust than to drag a man thousands of miles, perhaps from a distant state, and in effect compel him to appear and defend under the penalty of a judgment or decree against him pro confesso. The act of 1859 ought, therefore, to receive a construction in harmony with this policy. There exists no good reason why courts of equity should be invested with a more enlarged jurisdiction against non-residents than courts of law." This was followed by the case of *Scott v. Noble*, 72 Pa. 115, in which we held that Noble was not bound by process directed to be served upon him by the supreme judicial court of Massachusetts outside the state, though he had accepted service of the writ in the state of Pennsylvania. By the Act of March 13, 1815, P. L. 150, regulating proceedings in divorce, the act provides for service upon the respondent "wherever found," but in *Ralston's Appeal*, 93 Pa. 133, we said of that act: "It declares 'upon due proof at the return of the said subpoena that the same shall have been served personally on the said party wherever found, or that a copy had been given to him or her fifteen days before the return of the same,' a divorce may be decreed. It is contended in case the libellee in divorce is not found within the bailiwick of the sheriff, the latter may, under this act, depute some person to make the service in another state. If a legal service could thus be made in Delaware it can be in California. Such cannot be a true construction of the statute. The language 'wherever found' cannot be so construed as to give to a court of this state extra-territorial power to bring within its jurisdiction the person of a citizen and resident of another state. The property found

within this state of a non-resident may be reached and charged and sold in the enforcement of a debt resting on a contract without any personal service on the debtor. In the case of an ordinary debt, the person of a non-resident defendant not found within the state cannot be reached by any process issued by a court of common law. In cases where the language of the statute would seem to give extra-territorial power this court has denied its exercise. Thus the 16th section of the Act of 13th June, 1836, relating to the removal of paupers, authorizes them to be removed 'at the expense of the district to the city, district or place where he was last legally settled, whether in or out of Pennsylvania.' It has, however, been held the provision for a removal into another state is of no force or effect: *Overseers of Limestone v. Overseers of Chillisquaque*, 6 Norris 294. The first section of the Act of 6th April, 1859, authorizes any court of this commonwealth having equity jurisdiction, in any suit in equity instituted therein concerning property within the jurisdiction of the said court, to order and direct that any subpoena or other process to be had in such suit be served on any defendant therein 'then residing or being out of the jurisdiction of said court wherever he, she or they may reside or be found.' It further provides for the proof of service both within and without the limits of the United States. It was held in *Coleman's Appeal*, 75 Pa. 41, that process thus issued in this state and served in another state on a resident thereof could not give jurisdiction of the person thus served." In the federal courts the same view is entertained. By a statute of the state of Oregon provision was made for service upon a non-resident by publication. In *Pennoyer v. Neff*, 95 U. S. 714, it appeared that judgment had been entered against Neff on process which the plaintiff undertook to have served upon him extra-territorially, by publication, in conformity to the statute. Judgment was entered in the proceeding against him, and, in holding that he was not bound by it, through Mr. Justice FIELD, it was said: "Where the entire object of the action is to determine the personal rights and obligations of the defendants, that is, where the suit is merely in personam, constructive service in this form upon a non-resident is ineffectual for any purpose. Process from the tribunals of one state can-

not run into another state, and summon parties there domiciled to leave its territory and respond to proceedings against them." In the Circuit Court of the United States, for the western district of this state, in the case of *McHenry v. New York P. & O. R. R. Co.*, 25 Fed. Repr. 65, the Court of Common Pleas of Westmoreland county had made an order of service on aliens in pursuance of the act of 1859, but it was said by the Circuit Court: "It is, indeed, true that pursuant to an order of the Court of Common Pleas, claimed to be authorized by the Pennsylvania Act of April 6, 1859, P. L. 387, process has been served on those defendants in England, where they reside, but, clearly, such extra-territorial service was ineffectual to bring them within the jurisdiction of the court or make them parties to the suit: *Pennoyer v. Neff*, 95 U. S. 714."

The service upon the appellee was ineffectual to bring it into this jurisdiction, and the order of the court below setting it aside was properly made. That order is now affirmed and this appeal dismissed at the costs of appellant.

BARRY V. WACHOSKY.

Supreme Court of Nebraska. 1899.

57 Nebraska, 534.

RAGAN, C.

James M. Barry, J. M. Brannan, and C. D. Ryan, made their promissory note for \$500 and delivered the same to one D. F. Clarke. The note was payable to Clarke only. It was non-negotiable. Before the note matured Clarke seems to have sold it to Michael Wachosky. At any rate he wrote his name across the back of the note, and over that he recited in writing that he guaranteed the payment of the note, and delivered it to Wachosky. The latter, in the county court of Douglas county, brought a suit against Clarke, Barry, Brannan, and Ryan and set out in his petition the execution and delivery of the note by the makers thereof to Clarke, and then that Clarke wrote his name on the back of the note, and wrote over his name his contract guaran-

teeing the payment of the note, and delivered it to him, Wachosky. Clarke resided and was summoned in Douglas county. The makers of the note were found and summoned in Dakota county. The makers of the note on being brought into the county court, appeared specially and objected to the jurisdiction of the court over them, upon the grounds that they were found and summoned in Dakota county, where they resided, and that Clarke was summoned in Douglas county. This objection of the makers to the jurisdiction of the county court over them was by it overruled. The makers of the note then answered to the merits of Wachosky's petition, and interposed as a defense to the court's jurisdiction the fact that they were residents of and found and summoned only in Dakota county. Wachosky, by a reply to this answer, admitted that the makers were found and summoned only in Dakota county. Wachosky had a verdict and judgment in the county court, and the makers prosecuted a petition in error to the district court to reverse that judgment. The district court affirmed the judgment of the county court, and its judgment is now before us on a petition in error.

* * * * *

Section 60 of the Code of Civil Procedure provides, in substance, that every action not otherwise specifically provided for must be brought in the county in which the defendant, or some one of the defendants, resides or may be summoned. Section 65 of the Code provides that when an action is rightly brought in any county a summons may be issued to another county against any one or more of the defendants at the plaintiff's request. Now Clarke was made a defendant to this action, and he was served with a summons in Douglas county, and therefore it was proper to summon the other defendants to the action in Dakota county, if the action was rightly brought against Clarke in Douglas county. The test for determining whether an action be rightly brought in one county against the defendant found, and served therein, so that the other defendants may be served in a foreign county is whether the defendant served in the county in which the action is brought is a *bona fide* defendant to that action—whether his interest in the action and in the result thereof is adverse to that of the plaintiff. (*Hanna v. Emerson*, 45 Neb. 708, and cases there

cited; *Miller v. Meeker*, 54 Neb. 452.) *Pearson v. Kansas Mfg. Co.*, 14 Neb. 211, is no longer regarded as sound, but has in effect long been overruled. So that, looking at this action as a suit upon the promissory note executed by the plaintiffs in error to Clarke, we have the question, Did Clarke, by assigning this note to Wachosky become liable upon the note? We think not. The note was non-negotiable. It was merely a chose in action. It was assignable, and when assigned by Clarke, the payee, his assignee, Wachosky, could maintain an action upon it in his own name, and to this action Clarke was not a necessary party. (Code of Civil Procedure, sec. 30.) Clarke, by assigning this note to Wachosky, did not become liable to him or his assignee on the note, and therefore, viewing this action as a suit upon the note, Clarke was not interested in the result of that action adversely to Wachosky, and therefore the action was not rightly brought on the note in Douglas county and the court had no jurisdiction over the plaintiffs in error. Of course, if the payee of a negotiable promissory note writes his name across the back thereof, without more, and delivers it to a third party, the law will write over that signature the promise on the part of such payee that, if the holder thereof presents it to the maker when due for payment, and it be dishonored, and he be given due notice thereof, he will pay the note to the holder. But the payee of a non-negotiable note who sells it, writes his name across the back thereof, and delivers it to the vendee, without more, does not thereby become liable upon the note. His assignment and delivery of the note simply amounts to a quit claim upon his part of his interest in the note to his vendee. Such a payee of such a non-negotiable note may, of course, make himself liable to his assignee for the payment of the said note by a writing evidencing such a contract over his signature. But in that case such a contract would be a separate and independent one from the contract evidenced by the note and would not affect the makers of the note nor their liability; nor enable the holder of the note to unite in one action the makers and the payee. In the case at bar Clarke did write over his signature on this note a guaranty of payment, and by so doing he became liable to Wachosky as a guarantor of this note. But the makers of the note were not parties to the contract of

guaranty. The contract of guaranty was Clarke's contract, and a separate and independent contract from the contract made by plaintiffs in error. Clarke was not, and is not, liable to Wachosky on the note. The makers of the note are not liable to Wachosky on Clarke's guaranty. Therefore, if we regard this as a suit upon the note, Clarke was not a proper party thereto, and the court had no jurisdiction over the plaintiffs in error. If we regard it as a suit upon the guaranty, Clarke was the only proper party thereto and the court had no jurisdiction over the plaintiffs in error. Wachosky has, perhaps, two causes of action. One cause of action is on the note and against the makers thereof. The other cause of action is against Clarke on his guaranty of payment. These two causes of action cannot be united, for the obvious reason that each one does not affect all the parties to the action. (*Mowery v. Mast*, 9 Neb. 445; Code of Civil Procedure, sec. 88.) The judgment of the district court is reversed and the action, so far as it affects the plaintiffs in error, is dismissed.

Reversed and dismissed.

SECTION 5. RETURN OF SERVICE.

JONES V. BIBB BRICK COMPANY.

Supreme Court of Georgia. 1904.

120 Georgia, 321. x-1

Motion to set aside judgment. Before Judge HODGES. City Court of Macon. October 17, 1903. [Judgment set aside. Plaintiff excepted.]

* * * * *

LAMAR, J. A summons of garnishment directed to the Bibb Brick Company was served, August 23, 1902, the return of the officer showing that he had served the summons on "Bibb Brick Co., by handing the same to John T. Moore, its secretary and treasurer." * * * The motion to set this judgment aside is verified by Moore, and does not deny that he was in charge of the office or of the business

of the company in the county. * * * We are therefore to deal with a case in which the return of the officer, who had made good service, was incomplete and defective in its failure to allege that Moore, "secretary and treasurer," was "in charge of the office or business" of the garnishee at the time the summons was handed to him in person.

1-7. Process and service are essential. But the return, being only evidence of what the officer has done in serving the writ, is not jurisdictional. Still it is manifest that a court ought not to proceed without having a legal return of record to show that its process had been actually served, and that it had acquired jurisdiction over the person of the defendant. If there is an entire absence of a return, or if the return made is void because showing service on the wrong person, or at a time, place, or in a manner not provided by law, the court cannot proceed. *Callaway v. Douglasville College*, 99 Ga. 623. If, however, the fact of service appears, and the officer's return is irregular or incomplete, it should not be treated as no evidence, but rather as furnishing defective proof of the fact of service. The irregularity may be cured by an amendment which does not make or state a new fact, but merely supplies an omission in the statement as to an existing fact. Where there has been valid service and no return, the deficiency may be supplied before taking further steps in the cause. If there has been service and a voidable or defective return, it may be amended even after judgment, so as to save that which has been done under service valid in fact but incompletely reported to the court. For in its last analysis it is the fact of service, rather than the proof thereof by the return, which is of vital importance. Ordinarily service is either good or bad. But process and return existing in writing may vary between void, voidable, and perfect. If either is void, the judgment predicated solely thereon is a nullity. Where process and return are not void, some classes of defects therein are cured by judgment. For many things are sufficient to prevent a judgment from being rendered which would be insufficient to set aside a judgment actually rendered. Hence the Civil Code, section 5365, declares that "a judgment cannot be arrested or set aside for any defect in the pleadings or *record* that is aided by verdict, or amendable as matter of form." This right to amend a

“return” so as to make it conform to the facts is allowed on general principles and by our statute. If the officer is in commission and liable on his bond, he may make this amendment voluntarily. Civil Code, section 5116. If he is dead or out of commission, or refuses to make the return which the facts require, then the amendment may be ordered by the court *nunc pro tunc*. * * *

* * * In *Hargis v. E. T. Va. & Ga. Ry. Co.*, 90 Ga. 42, the return was attacked before judgment; there was no offer to amend, and no proof that the agent was in charge, or that service upon him would have bound the company. The court therefore properly declined to enter judgment against the garnishee. In *Southern Ry. Co. v. Hagan*, 103 Ga. 564, the original record shows that the process was void, and the garnishee attacked the judgment not on the ground that the return was defective but because it had never been served with a summons of garnishment. But none of these cases determine what would have been the effect of valid process and perfect service, with an incomplete or defective return where the judgment rendered thereon was attacked and the motion to set aside and evidence thereunder showed valid service in fact. Such was the case of *Third National Bank v. McCullough*, 108 Ga. 249, where the service was perfect, but the return failed to recite that Hawkins, president, was in charge; and yet the judgment against the garnishee by default was allowed to stand, there being no allegation in the attack thereon that Hawkins was not in fact the agent of the bank, in charge of its affairs in the county. In support of this ruling the court cited *Sou. Ex. Co. v. Skipper*, 85 Ga. 565, determined under a statute where service upon an agent was only allowed when the president of the garnishee company resided out of the State. The return was silent as to the residence of the president, and yet after service upon the local agent alone the default judgment was held sufficient, the court saying, that “in rendering judgment based on the service its sufficiency was adjudicated at least in an incidental way.” The same principle was involved in *Holbrook v. Evansville Co.*, 114 Ga. 2, where the return did not follow the language of the statute, and was therefore not perfect in its verbiage.

Under the authorities, therefore, it is evident that the

defective return might have been amended to conform to the facts, and that such amendment when made would have related back so as to make the record complete and the judgment perfect. But it may be claimed that here the defect was never cured, since no amendment was ever made. None was necessary. Whatever may be the rule in ordinary cases, both the allegations and the silence of this motion make it certain that the garnishee had been duly served.

* * * * *

Judgment reversed. All the justices concur.

SMOOT V. JUDD.

Supreme Court of Missouri. 1904.

184 Missouri, 508.

MARSHALL, J.—This is a bill in equity to set aside a judgment of the circuit court of Barton county rendered on September 18, 1891, in favor of G. S. Judd and against Ella G. Smoot and Samuel N. Smoot, and the execution issued thereunder, and the sheriff's deed to certain land in that county made to said Judd as purchaser at such execution sale. * * *

* * * * *

Ella G. Smoot and Samuel N. Smoot are and at all times hereinafter mentioned were husband and wife. Mrs. Smoot owned lots 4, 5, and 6, in Jasper, Missouri, but it does not appear whether it was her separate estate or only a legal estate. Being such owner, she and her husband, on April 15, 1887, executed and delivered to G. S. Judd their promissory note for \$683.61, payable one day after date. * * * The debt was not paid, and on July 28, 1891, the debt being then over four years past due, Judd instituted suit in the Barton Circuit Court against Mr. and Mrs. Smoot. The petition did not describe the defendants as husband and wife. A summons was regularly issued, and was returned by the sheriff as having been served personally upon both Mr. and Mrs. Smoot. * * * The case was allowed to go by default,

and on September 18, 1891, a personal judgment was rendered against Mr. and Mrs. Smoot, for \$925.13. On the 3rd. of February, 1891, Mrs. Smoot's brother, Peter A. Gordon, died leaving certain land in Barton county, and Mrs. Smoot inherited an undivided one-fourth interest therein. On January 20, 1892, an execution was issued on said judgment and was levied on Mrs. Smoot's interest in the land. * * * The land was then sold on March 10, 1892, and Judd became the purchaser of Mrs. Smoot's interest therein for \$510.00, and received a sheriff's deed therefor.

The matter stood thus until October 30, 1893, when, the time for redemption having expired and the Smoots having done nothing, Judd instituted a suit for the partition of the land. * * * On April 14, 1894, a decree in partition was rendered and on September 3, 1894, the land was sold under that decree, and the defendants Brand and Jackson became the purchasers and received the sheriff's deeds therefor, entered into possession and have remained in possession ever since. It is conceded that at some time, the date is not disclosed by the record, Mrs. Smoot sued the sheriff on his official bond, for \$3,000 damages, for the loss of her land, by the sale under said personal judgment, alleging that his return upon the summons that he had served it upon her personally was false, and that upon a trial of that case she recovered a judgment for nominal damages.

On August 18, 1895, Mrs. Smoot instituted this suit in equity. The petition alleges nearly all the facts hereinbefore set out, and predicates a right to recover upon the falsity of the sheriff's return aforesaid. The action was brought against Judd, Brand, Jackson, and Mr. Smoot. Judd and Smoot though personally served made default, and the action is defended by Brand and Jackson, the purchasers of the property at the partition sale. * * *

* * * * *

I.

At some time, not definitely stated, the plaintiff sued the sheriff for damages for false return, and recovered a judgment. If that action was instituted before this suit was begun, it would clearly be a bar to this suit, for even if it should be conceded that the plaintiff was entitled to both remedies, the election to take one, would preclude a right

thereafter to pursue the other. (*Nanson v. Jacob*, 93 Mo. l. c. 345; *Nalle v. Thompson*, 173 Mo. l. c. 616.) In any event, without regard to which action was begun first, it now appears that the plaintiff prosecuted her suit against the sheriff to a final and successful result. This being true, whatever wrong or loss she suffered in consequence of the alleged false return of the sheriff, has been compensated for, and she has obtained satisfaction therefor. So that even if it could be conceded that her remedy was double, her wrong and loss was single and she could have only one satisfaction, and having received that in the other action, she is no longer entitled to pursue this remedy. (*Rivers v. Blom*, 163 Mo. l. c. 448; *Bank v. Bank*, 130 Mo. l. c. 168.)

But, as hereinafter pointed out, I am of opinion that her remedy was confined to an action on the sheriff's bond, for false return, and that she cannot maintain a suit in equity to set aside the judgment or its consequences, because of the falsity of the sheriff's return showing personal service on her.

II.

When the case was here on former appeal, it was held that while the adjudications in this State had held that a sheriff's return is conclusive, except in an action against the sheriff for a false return, still in some other jurisdictions, a bill in equity would lie to set aside a judgment, by default, based upon a false return of the sheriff showing service of the summons upon the defendant, and accordingly it was then held that the return of the sheriff was not conclusive, and that this action would lie. (*Smoot v. Judd*, 161 Mo. 673.)

With the greatest respect for the learned judge who wrote that opinion and for the equally learned judges who concurred in it, I am constrained to say, I think it does not announce the true rule of law in this State, and that it should be overruled.

Ever since the decision of this court in *Hallowell v. Page*, 24 Mo. 590, the law has been uniformly declared in this State to be that "the return of a sheriff on process, regular on its face, and showing the fact and mode of service, is conclusive upon the parties to the suit. Its truth can

be controverted only in a direct action against the sheriff for false return." * * *

In *Stewart v. Stringer*, 41 Mo. l. c. 404, WAGNER, J. said: "The courts of some of the States have held that a sheriff's return is merely prima facie evidence of the facts therein stated; but the law is firmly settled in this State that a defendant cannot controvert the truth of the sheriff's return. If the return of a sheriff to a process is regular on its face, it is conclusive upon the parties to the suit, and the remedy for the party injured is an action against the sheriff for a false return."

But it is said that, in all the cases cited, the attack upon the sheriff's return was made in the original case, either before or after judgment and that while it was held that the sheriff's return was conclusive upon the parties in the original case, it was not held that such a return could not be attacked by a direct proceeding in equity, and upon former appeal it was pointed out that in Alabama, Tennessee, Kansas, Arkansas, Connecticut, Colorado and Illinois, it is held that a false return of the sheriff can be attacked and set aside by a direct proceeding in equity. Accordingly it was held upon former appeal of this case that the alleged false return of the sheriff in the original case of *Judd v. Smoot* could be attacked and set aside in this suit in equity.

This raises the question whether or not a return of a sheriff can be attacked and, if found to be false, a judgment at law by default founded thereon, can be set aside in a direct proceeding in equity.

Gwynne on Sheriffs, page 473, thus states the law: "It is a well settled principle of the English law, that the sheriff's return is not traversable, and the court will not try on affidavits, whether the return of a sheriff to a writ is false, even though a strong case is made out, showing fraud and collusion, but the party must resort to his remedy by an action against the sheriff for a false return. In Connecticut, the return of the sheriff on a mesne process is held to be only prima facie evidence, but even in that State, he cannot falsify it by his own evidence. In most, and probably all of the other States in the United States, the rule is established, that as between parties to the suit, in which the return is made, and privies, and the

officer, except when the latter is charged in a direct proceeding against him for a false return, the sheriff's return is conclusive and cannot be impeached. A party or privy may not aver the falsity of a return made by the proper officer, without a direct proceeding against the officer, even in chancery."

Walker v. Robbins, 14 How. (U. S.) 584, was an injunction to restrain the enforcement of a judgment, based upon a marshal's return of personal service, and which the deputy marshal who served the process testified was false. The Supreme Court of the United States, speaking through Mr. Justice CATRON, said: "Assuming the fact to be that Walker was not served with process, and that the marshal's return is false, can the bill, in this event, be maintained? The respondents did no act that connects them with the false return; it was the sole act of the marshal, through his deputy, for which he was responsible to the complainant, Walker, for any damages that were sustained by him in consequence of a false return. This is free from controversy; still the marshal's responsibility does not settle the question made by the bill, which is, in general terms, whether a court of equity has jurisdiction to regulate proceedings, and to afford relief at law, where there has been abuse, in the various details arising on execution of process, original, mesne and final. If a court of chancery can be called on to correct one abuse, so it may correct another; and in effect, to vacate judgments, where the tribunal rendering the same would refuse relief, either on motion, or on a proceeding by *audita querela*, where this mode of redress is in use. In cases of false returns affecting the defendant, where the plaintiff at law is not in fault, redress can only be had in the court of law where the record was made, and if relief cannot be had there, the party injured must seek his relief against the marshal." Accordingly equitable relief was denied.

* * * * *

Hunter v. Stoneburner, 92 Ill. 75, was a bill in equity to set aside a judgment in partition and a sale thereunder, on the ground that the plaintiff had not been served with process, and for other reasons. The sheriff's return was personal service. The plaintiff succeeded in the lower court and the defendants appealed. The Supreme Court

of Illinois said: "It, then, appearing that appellee was served with process, he must be bound by the officer's return. It is in rare cases only that the return of the officer can be contradicted, except in a direct proceeding by suit against the officer for false return. In all other cases, almost without exception, the return is held to be conclusive. An exception to the rule is where some other portion of the record in the same case contradicts the return, but it cannot be done by evidence *dehors* the record." Accordingly the decree of the lower court was reversed.

* * * * *

Stewart v. Stewart, 27 W. Va. 167, was a bill in equity to set aside a judgment at law, and the question arose on a motion for rehearing by a defendant who had made default that the sheriff's return was false. The relief was denied, the Supreme Court saying: " * * * We see no reason for departing from the rule of the common law. If it is thought wise to permit the return of a sheriff on mesne or final process in any case, where the suit is not against him and his sureties for a false return, to be contradicted, the Legislature should furnish the remedy. We think the rule of the common law was founded in wisdom. Others besides the defendant to the suit are interested, that the return of the sheriff should be regarded as absolutely true. Rights of property would suffer under any other rule, and there is sufficient protection against false returns of sheriffs in the right of action directly against him and his sureties. If this rule is rigidly adhered to, sheriffs will be much more careful, and the rights of the citizens much better preserved, than if his returns either in mesne or final process could be contradicted. The only benefit, that could be given to the petitioner, would come through permitting her to contradict the sheriff's return, that she was served with process in the suit. He had no authority to serve the process as such officer outside of the State. If he had done so, such correction would entirely have destroyed his return. As we said in *Bowyer v. Knapp*, 15 W. Va. 291, we do not mean to decide, whether under our statute the return of the sheriff on process may not be contradicted by plea in abatement filed in the suit at the proper time. The court was justified in decreeing that the bill should be taken for confessed upon the return

of the sheriff. The petition was properly dismissed.”

* * * * *

Thomas v. Ireland, 88 Ky. 581, was a suit in equity to enjoin the enforcement of a judgment at law on the ground that the sheriff's return was false and that there was in fact no service. The court said: "It is well settled by this court that where the plaintiff acts in good faith in obtaining a judgment upon the return of the sheriff, endorsed upon the summons, that it was executed on the defendant, though in fact it was not, the return is conclusive as between the plaintiff and defendant. The stability of judgments require this rule; otherwise, judgments settling the rights of parties and giving remedies for the enforcement of these rights could never be regarded as permanent, but would be liable to be set aside, and the rights settled thereby be reopened, when the facts, not only appertaining to the service of the summons, but the merits of the controversy, had been forgotten or rendered unavailing by reason of the death of the parties or witnesses. Of course, if the plaintiff induces the sheriff to make a return that he had served the summons, when he had not, whereby the plaintiff is enabled to obtain judgment against the defendant, the chancellor would not hesitate to set the judgment aside, upon the ground that it was fraudulently obtained. Also, if he knew the sheriff had made a false return and took judgment against the defendant, notwithstanding, he would be regarded as an aider and abettor of the fraud, and the chancellor would set aside the judgment. But as long as the plaintiff is an innocent party, no false return of the sheriff, though procured by one of the defendants, and that defendant the husband of the wronged defendant (which is exactly the case here if what the sheriff says as to the first return is true), will justify setting aside the judgment as against the plaintiff. His protection lies in the fact that he is an innocent party. When the plaintiff is an innocent party the sheriff and his coadjutor, if he has one, are the wrongdoers, and the wronged party may have an action against them, or either, for damages commensurate to the injury he has sustained growing out of the wrongful act. Also as the sheriff is the wrongdoer and a party to the judgment, the proceeding to impeach his return is collateral; and it is well settled that his re-

turn cannot be impeached in a collateral proceeding for the purpose of setting aside or of getting rid of a judgment authorized by such a return."

The petition in that case alleged that the husband of the plaintiff had induced the sheriff to return the summons as personally served on his wife, the plaintiff in that action, so as to conceal from her the fact that there was danger of her land being sold.

* * * * *

Numerically, the State courts outside of Missouri appear to be equally divided upon the subject, but the Supreme Court of the United States and the English courts have always adhered to the rule that the officer's return is conclusive upon the parties to the suit and cannot be attacked even in equity, except where the plaintiff in the judgment has aided or abetted in the false return.

* * * * *

Upon principle and for practical purposes this is the better and wiser rule, and has become too deeply imbedded in the jurisprudence of this State, and the rights of too many purchasers at sheriff's sales have become fixed upon the faith of the rule, to permit it now to be changed. For it must be apparent that if judgments, and rights acquired under them by third persons, can afterwards be upset by a suit in equity, no one would risk money by buying at an execution sale, or, at best, would discount the risk by giving only a small proportion of the true value of the property. This would result in injury to the debtor and creditor both, for the debtor's lands would not sell for their true value, and the creditor would not realize on his claim in full. But in addition to this consideration, such a rule would offer a premium to a defendant to make default, let judgment go against him, let his land be sold, and a third party buy it, and thus have his debt paid, and then sue in equity to set aside the deed and recover his land by disproving the sheriff's return. Thus his debt would be paid, his creditor would be satisfied, the debtor would recover his land, and the only sufferer would be the purchaser at the judicial sale. Under such a rule, judicial sales would not amount to much when the people once understood the risks incurred. This is exactly the status of the case at bar. For these reasons I think this case was improperly decided on

former appeal and that the former decision should be overruled.

* * * * *

ROBINSON, C. J., concurs; BRACE, J., concurs in paragraphs 2, 4, 5, 6, 12 and 13, and in the result; BURGESS, J., concurs *in toto*; GANTT and FOX, J. J., concur in the result for the reasons expressed in the separate opinion of FOX, J.; VALLIANT, J., dissents in an opinion filed by him.

CROSBY V. FARMER.

Supreme Court of Minnesota. 1888.

39 Minnesota, 305.

Appeal by the plaintiff from an order of the municipal court of St. Paul, setting aside a judgment by default.

MITCHELL, J. Judgment by default was rendered against defendant in the municipal court of St. Paul, upon the return of a police officer that he had served the summons upon defendant in the city of St. Paul, Ramsey county, by leaving a copy at his last usual abode, with a person of suitable age and discretion then resident therein. Subsequently the judgment was vacated, on motion of defendant made on affidavits showing that he was not and never had been a resident of Ramsey county, but at the time of the alleged service was and ever since has been a resident of Steele county. The plaintiff presented no counter-affidavits, but relied on the conclusiveness of the officer's return,—contending that it could not be impeached; that, if false, defendant's only remedy was by action against the officer.

This question has never been squarely decided by this court,—at least as to a return on original process. * * *

* * * The rule of the English common law is that, as between the parties to the process or their privies, a sheriff's return is conclusive, and that the court will not try the truth of it on motion to set aside the proceedings, or allow any averment against it to be taken in pleading; that, if false, the only remedy is against the sheriff by action.

Com. Dig. tit. "Retorn" F 2 and G. The reason usually given for the rule is that it is necessary to secure the rights of the parties, and give validity and effect to the acts of ministerial officers. In England, process could only be served by the sheriff, who was the only ministerial officer known to the courts for that purpose. Moreover, under the common law practice which obtained there, it was almost impossible for judgment to be rendered against a party without actual personal notice to him. Under such a system, the rule might be convenient, and without much danger of working injustice.

But, under the practice which obtains in this and other states, most of the old safeguards have been removed; and the necessity for modifying the rule, and adapting it to the changed condition of the law, has been often felt and frequently acted upon, especially in the case of *original* process by which the court acquires jurisdiction. In the district court a summons may be served by any person not a party to the action, and his affidavit of service is placed virtually on the same footing as the return of the sheriff. In the municipal court of St. Paul the summons may be served by any policeman. The remedy by action for false return, under such a system, would often be inadequate or wholly fruitless. Again, the manner of service has been in other respects so materially changed that actual personal service is unnecessary, and the officer making service must often return as to facts not within his personal knowledge, but in the determination of which he must frequently rely upon information received from others. For example, service may be made by leaving a copy of the summons at the house of defendant's usual abode, with a person of suitable age and discretion then resident therein. In case of corporations service may be made, not only on certain specified general officers, but also, in certain cases, upon a managing or general agent, or even upon an acting ticket or freight agent. In case of minors under 14 years, the service must be both on the minor personally, and also upon his father, mother, or guardian, or, if none, upon the person having the care or control of the minor, or with whom he resides, or by whom he is employed. How can a sheriff determine where a man resides, or who resides with him, or who is the ticket or freight agent of a railway

company, or who has the care or control of a minor, or by whom he is employed, except upon information? And why should his return as to these facts be conclusive? If the officer makes a mistake, why should the defendant be compelled to allow the judgment against him to stand, and resort to his suit against the officer, instead of being permitted to apply in a direct proceeding in the action to set aside the false return? We can see no good reason why the plaintiff should have a sum of money to which he is not entitled, and the officer be compelled to pay the defendant a like sum for making what may have been an honest mistake. If somebody must suffer loss for the mistake, it is right it should fall on him who made it; but, if discovered in time to prevent loss to anyone, why should not the mistake be corrected on motion? There are very good reasons why the return of a ministerial officer should be held conclusive in all collateral proceedings, but we can see none, either upon principle or considerations of policy, why it may not be impeached for falsity in direct proceedings in the action; assuming always, of course, that no rights of third parties have intervened. Any evils or inconvenience which can possibly arise from permitting this to be done would, in our judgment, be greatly outweighed by the injustice that would often result from prohibiting it. The general tendency, especially in states having a Code practice like ours, is to allow the return to be impeached by an affidavit, on motion or other direct proceedings to vacate. *Bond v. Wilson*, 8 Kan. 228; *Walker v. Lutz*, 14 Neb. 274, (15 N. W. Rep. 352); *Wendell v. Mugridge*, 19 N. H. 109; *Carr v. Commercial Bank*, 16 Wis. 52; *Stout v. Sioux City & Pacific Ry. Co.*, 3 McCrary, 1, (8 Fed. Rep. 794); *Van Rensselaer v. Chadwick*, 7 How. Prac. 297; *Wallis v. Lott*, 15 How. Prac. 567; *Watson v. Watson*, 6 Conn. 334; *Rowe v. Table Mt. Water Co.*, 10 Cal. 442.

Some of the cases seem to make a distinction between mesne and final process and the original process, like a summons, by which the court acquires jurisdiction of the defendant. We confess that we cannot see at present why there should be any such distinction; but, without deciding that question, we are of opinion that, upon a motion made in the action to vacate a judgment by default on the ground

of no service of the summons, the return of the officer may be impeached by affidavits, as was done in this case.

*Order affirmed.*¹

1Conclusiveness of Sheriff's Return. There is a great diversity of judicial opinion upon this subject, and a close inquiry into the various rules and their limitations would be of little value here. The cases given above illustrate the antagonistic views which lead to the extreme positions on each side of the question. Between these there are numberless gradations. The following quotations will illustrate the extent and variety of the considerations which control the decisions upon this subject.

Kochman v. O'Neill, (1903) 202 Ill. 110, 66 N. E. 1047: "A sound public policy, the security of litigants and the stability of legal proceedings demand that the return of the sworn officer shall not be set aside or impeached except upon satisfactory evidence. Every presumption in favor of the return is indulged, and it will not be set aside upon the uncorroborated testimony of the party upon whom service purports to have been made. (*Davis v. Dresback*, 81 Ill. 393.) Justice, however, requires that the rules shall not be so strict as to prevent all relief against a return which is untrue through fraud, accident or mistake, and if it is clear from the evidence that the defendant has not been served the judgment should be set aside." Similar statement in *Westman v. Carlson*, (1910) 86 Nebr. 847, 126 N. W. 515.

Waterbury National Bank v. Reed, (1907) 231 Ill. 246, 83 N. E. 188: "It is, however, the law of this state that when a judgment of a court of general jurisdiction recites that there was actual service of process upon the defendant in apt time and there is nothing in the record to contradict such record or return, the finding or return cannot, at law, be impeached by evidence *dehors* the record, (*Rust v. Frothingham*, Buese, 331; *Barnet v. Wolf*, 70 Ill. 76; *Zepp v. Hager*, id. 223; *Harris v. Lester*, 80 id. 307; *Hunter v. Stoneburner*, 92 id. 75;) although in a proper case a false return may be set aside in equity; (*Owens v. Ranstead*, 22 Ill. 161; *Hickey v. Stone*, 60 id. 458;) and it may be questioned before judgment by plea in abatement, (*Mineral Point Railroad Co. v. Keep*, 22 Ill. 9; *Holloway v. Freeman*, id. 197; *Sibert v. Thorp*, 77 id. 43; *Ryan v. Lander*, 89 id. 554; *Union National Bank of Chicago v. First National Bank*, 90 id. 56; *Chicago Sectional Electric Underground Co. v. Congdon Brake-Shoe Manf. Co.*, 111 id. 309); or in case of default entered upon such return, on motion promptly made, the same may be set aside (*Brown v. Brown*, 59 Ill. 315.)"

Meyer v. Wilson, (1906) 166 Ind. 651, 76 N. E. 748: "If, however, the process was not served by the officer, and false return was procured by the fraudulent acts of the plaintiff, or by a conspiracy between him and the officer, the same is not conclusive."

Hilt v. Heimberger, (1908) 235 Ill. 235, 85 N. E. 304: "Where rights of third persons have been acquired in good faith, the return of an officer showing the service of summons cannot be contradicted, but as against parties acquiring rights with notice of the facts the return is not conclusive."

Schott v. Linscott, (1909) 80 Kan. 536, 103 Pac. 997: "As to the fact of service, the general rule is that as between the parties to an action the return of the sheriff is conclusive; but if his return is of a fact not within his personal knowledge but dependent upon information received from others, a party is not precluded from an inquiry into the facts on which jurisdiction depends." Same rule stated in *Krutz v. Isaacs*, (1901) 25 Wash. 566, 66 Pac. 141.

Locke v. Locke, (1894) 18 R. I. 716, 30 Atl. 422: Motion to set aside decree and reinstate the case for trial on the ground that defendant had no notice of the pending thereof. "While it is true that an officer's return upon a writ is conclusive and cannot be controverted incidentally by motion or plea except in cases especially provided for by statute, *Angell v. Bowler*, 3 R. I. 77, yet, as under section 2 of chapter 26 of the Judiciary Act, the court has control over its decrees for the period of six months after the entry thereof, and 'may, for cause shown, set aside the same and reinstate the case, or

make new entry and take other proceedings, with proper notice to the parties, with or without terms, as it may by general rule or special order direct,' it is clearly within the power of the court to grant the relief asked for in this case without any infringement of the rule above stated, and without any reflection upon the officer who served the writ.'"

Michels v. Stork, (1883) 52 Mich. 260, 17 N. W. 833. This case contains an extended review of the authorities on this question in an opinion by Justice Cooley.

SECTION 6. PRIVILEGE FROM SERVICE.

PARKER V. MARCO.

Court of Appeals of New York. 1893.

136 New York, 585.

MAYNARD, J. The defendant is a resident of South Carolina and an action had been brought there against him in the Federal Circuit Court, by the plaintiff, who is a resident of this state. On April 6, 1892, the defendant came to the city of New York at the instance of the plaintiff to attend an examination of the plaintiff and his witnesses before a notary public, which by the agreement of the counsel for the respective parties had been set down for that date. The plaintiff procured the defendant's assent to the examination upon the statement that he desired to be in readiness to try the cause at the ensuing April Circuit, to be held at the city of Charleston. When the time for taking the testimony arrived the defendant was informed by plaintiff's counsel that he had abandoned his intention to take the evidence as proposed, for the reason that on account of sickness in his, the counsel's family, the plaintiff would not be prepared to go to trial at the April Circuit, and he expected to be able to produce his witnesses in court when the trial should take place at a subsequent term. It was then late in the afternoon and the defendant returned to his hotel and remained over night, and the next morning started for his home in South Carolina. He was intercepted at the ferry by a process server, who served him with a summons in this action brought by the plaintiff in the supreme Court of this state for the same cause of action at issue in the Federal Court in South Carolina. The defendant had no

business in New York except that which related to the proposed examination. The defendant has appealed from an order of the General Term, reversing an order of the Special Term, which set aside the service of the summons upon the ground that, when served, he was privileged from service.

Under Section 863 of the Revised Statutes of the United States the plaintiff had an absolute right to take the testimony of his witnesses in this state to be used upon the trial of the action in South Carolina upon giving reasonable notice to the defendant. The compulsory character of the proceeding was not affected by the waiver of notice and the fixing of the time by the agreement of parties. (*Plimpton v. Winslow*, 9 Fed. R. 365.) The same section provides that a person may be required to appear and testify before the notary in the same manner as witnesses in open court, and section 915 of our own Code authorizes any state judge to issue a subpoena to compel the attendance of a witness in such a case. In the trial of the action the notary thus becomes the arm of the court, and, as was held *In re Rindskopf* (24 Fed. R. 542) represents the court *pro hac vice*.

The privilege of a suitor or witness to be exempt from service of process while without the jurisdiction of his residence for the purpose of attending court in an action to which he is a party or in which he is to be sworn as a witness is a very ancient one. (Year Book 13, Hen. IV., I. B. Viner's Abr. "Privilege.")

It has always been held to extend to every proceeding of a judicial nature taken in or emanating from a duly constituted tribunal which directly relates to the trial of the issues involved. It is not simply a personal privilege, but it is also the privilege of the court, and is deemed necessary for the maintenance of its authority and dignity and in order to promote the due and efficient administration of justice. (*Person v. Grier*, 66 N. Y. 124; *Matthews v. Tufts*, 87 id. 568.) At common law a writ of privilege or protection would be granted to the party or witness by the court in which the action was pending, which would be respected by all other courts. We cannot find that the power to issue such a writ has been abrogated by legislation, and it doubtless exists, and the writ may still be granted by courts

possessing a common law jurisdiction; but while the granting of the writ is proper, it is not necessary for the enjoyment of the privilege, and the only office which it can perform is to afford "convenient and authentic notice to those about to do what would be a violation of the privilege, and to set it forth and command due respect to it." (*Bridges v. Sheldon*, 7 Fed. R. 44.) The tendency has been not to restrict but to enlarge the right of privilege so as to afford full protection to parties and witnesses from all forms of civil process during their attendance at court and for a reasonable time in going and returning. (*Larned v. Griffin*, 12 Fed. Rep. 592.)

Hearings before arbitrators, legislative committees, registers and commissioners in bankruptcy, and examiners and commissioners to take depositions, have all been declared to be embraced within the scope of its application. (*Bacon's Abr.* "Privilege"; *Sandford v. Chase*, 3 Cow. 381; *Matthews v. Tufts*, *supra*; *Hollender v. Hall*, 18 Civ. Pro. 394; 19 *id.* 292; *Thorpe v. Adams*, *id.* 351; *Bridges v. Sheldon*; *Plimpton v. Winslow*; and *Larned v. Griffin*, *supra*.) It has even been extended to a suitor returning from an appointment with his solicitor for the purpose of inspecting a paper in his adversary's possession in preparation for an examination before a master, (*Sidgier v. Birch*, 9 Ves. 69) and while attending at the registrar's office with his solicitor, to settle the terms of a decree (*Newton v. Askew*, 6 Hare, 319); and while attending from another state to hear an argument in his own case in the Court of Appeals (*Pell's case*, 1 Rich. L. 197.) No good reason can be perceived why the privilege should not be extended to a party appearing upon the examination of his adversary's witnesses, where the testimony is taken pursuant to the authority of law, and can be read upon the trial with the same force and effect as if it had been taken in open court. It is a proceeding in the cause, which materially affects his rights, and the necessity for his attendance is quite as urgent as it would be if the examination was had at the trial. But we do not think that the question of the necessity of his presence is material. It is the right of the party, as well as his privilege, to be present whenever evidence is to be taken in the action, which may be used for the purpose of affecting its final determination. It is essentially a part

of the trial, and should be so regarded so far as it may be necessary for the protection of the suitor. There have been many analogous cases in the Federal Courts where the right to the privilege has been upheld. In *Bridges v. Sheldon*, (*supra*), the action was pending in the U. S. Circuit for Vermont. A reference had been ordered to a master to take and state an account. The master on motion of the plaintiff had made an order for the taking of a deposition before a commissioner in the state of Iowa. The defendant, while attending before the commissioner in Iowa, was served with process in a suit brought by the plaintiff for the same cause of action as in the Federal court. Judge WHEELER, in very strong terms, condemned the procedure, and held that the defendant was absolutely privileged from service, and that the conduct of the plaintiff in causing such service to be made was a contempt of court, and could be punished as such. It seems that in such a case a party has a two-fold remedy. He may move in the court, whose privilege has been violated, to punish the party in that court who has been guilty of such violation, or he may move in the court out of which the process has been improperly issued to vacate it, and the motion will be granted.

* * * * *

It may be assumed that the plaintiff acted in entire good faith, and that his procedure was not a device to secure the presence of the defendant within the territorial jurisdiction of the courts of this state. In the view we take of the privilege of the defendant, the plaintiff's motive is of no importance.

The order of the General Term should be reversed, and the order of the Special Term affirmed, with costs.

All concur except GRAY, J., dissenting.

Order reversed.

GREENLEAF V. PEOPLE'S BANK OF BUFFALO.

Supreme Court of North Carolina. 1903.

133 North Carolina, 292.

CLARK, C. J., concurring. The defendant Morey was served with summons in this case while at a hotel in this State. He contends that because he was a lawyer, resident in another State, and was attending court in this State as counsel in a cause therein pending, the service should be struck out. The proposition is a novel one in a land where equality before the law is the ruling principle and where special privilege to any class of our citizens is not only not recognized by law but is prohibited by the Constitution. A careful examination shows no ground for the alleged exemption of lawyers from service of summons. There is no precedent in England to sustain the proposition, and none in this country save a single case, a very recent one—*Hoffman v. Circuit Judge*, 113 Michigan, 109; 38 L. R. A. 663; 67 Am. St. Rep., 458—which holds that a lawyer, resident in the same State, is privileged from service of a summons while attending the Supreme Court of the State or going or returning therefrom, but none of the authorities cited in that opinion sustain its conclusion. The reason given in the opinion is that while by statute in that State the prohibition of the arrest of counsel in a civil suit is restricted to the actual sitting of a court at which he is engaged, that this does not repeal the common-law exemption of counsel from service of summons. But, on the other hand, the most eminent lawyer which that State (Michigan) has produced, Judge Cooley, in a note to his work on Constitutional Limitations (5th Ed.), p. 161, says: "Exemption from arrest is not violated by the service of citation or declaration in civil cases." Besides, there was at common law no exemption of lawyers from service of process other than *arrest*, and the reason for the latter was that it would be an injury to clients whose cause had been prepared for trial by such counsel to suddenly deprive them of his services, but service of a summons does not have that effect.

In *Robbins v. Lincoln*, 27 Fed. Rep., 342 (United States Circuit Court for Illinois), it is well said: "Inasmuch as

resident attorneys may be served with summons while in attendance upon court, an attorney from another State has no greater privilege." This is exactly in point here. It is well known that no lawyer in this State has ever in its history been privileged, or contended even that he was privileged, from service of summons while attending court. If he were, as the Constitution, Art. IV., sec. 22, now provides that "the courts are always open," no lawyer or judge could ever be served with summons. In England, Blackstone says (3 Bl. Com., 289), that lawyers could not be *arrested* on civil process while in attendance upon court, but could be served with a bill, without arrest, which was equivalent to service of a summons. The same is stated in 8 Bacon's Abr. "Privilege" B., with the modification that if an attorney is sued with another (as in this case), "he is not privileged from arrest, even though it is during his attendance in court," the evident reason being to prevent class discrimination. The exemption of lawyers from arrest, it seems, has now been repealed in England. In this State the English privilege of exemption of lawyers from *arrest* has never been recognized. It is well known that one of the most distinguished lawyers and judges of this State, whose portrait now hangs on the walls of this chamber, was arrested and imprisoned for debt, and long prevented from attending upon court. This barbarous proceeding of imprisonment for debt, handed down from the common law, should have been repealed long before it was, but while it was in force our predecessors applied it impartially, and the bench did not hold their own members or their profession exempt. There was not at common law, and has not been in this State, any exemption of any one from service of summons, and the exemption from arrest under our statute is conferred only upon witnesses and jurors. The Code, secs. 1367 and 1735. And even witnesses and jurors are not exempted from service of summons, since such service would not deprive the court of their presence. There is no reason why lawyers should be privileged from either arrest or service of summons any more than other officers of the court, as sheriffs, clerks, criers and the like, and the legislative power has therefore seen fit to make the exemption apply only to witnesses and

jurors, and, as to them, to make the exemption extend to freedom from arrest only.

As to non-residents, in *Cooper v. Wyman*, 122 N. C., 784, this Court held that non-resident witnesses and suitors coming into this State solely for the purpose of litigation were exempt from service while here for that purpose only. This was put upon the ground of necessity, because the State could not *compel* their presence, and that since no one else could fill their functions it was in the interest of justice to give them "a safe conduct." But this reasoning has not obtained in some States, notably Illinois, which holds that neither are exempt from service of summons. *Greer v. Young*, 120 Ill. 184, citing authorities. In *Nichols v. Goodheart*, 5 Ill. App., 574, it was held that a defendant involuntarily in the State, by virtue of criminal process, is not exempt from service of summons, citing *Williams v. Bacon*, 10 Wend. (N. Y.), 636. Other States hold that the rule is restricted to witnesses only. *Shearman v. Gunlatch*, 37 Minn., 118. Other States extend the exemption to parties also, since they have become competent as witnesses (*Mitchell v. Huron*, 53 Michigan, 541), and our State has adopted that rule, but restricts the exemption to those two—"non-resident witnesses and parties." An exhaustive brief of all the authorities, showing that the privilege extends only to non-resident witnesses and parties, will be found in the notes (eighteen pages) to *Mullen v. Sanborn*, 25 L. R. A., 721-738. No court whatever has in any case extended the exemption to non-resident lawyers. The nearest approach to it is *Trust Co. v. Railroad*, 74 Fed. Rep., 442, in which a subpoena served upon non-resident counsel, which prevented his returning home and attending to business he had left unprovided for, was set aside. That case is not sustained by any previous authority, and evidently rests more upon the ground stated therein, that the non-resident subpoenaed was president of a railway company, than because he was also a lawyer, but, if sound, it is very far from sustaining an alleged exemption from service of summons, which did not prevent Morey from returning home and adjusting his business, for the trial of his case is for a subsequent term.

The United States Constitution, Art. I, sec. 6, prohibits the arrest of a member of the House of Representatives or

a Senator during the session, except for treason, felony and breach of the peace. There is a similar provision as to the members of the Legislature in Nebraska. The numerous and uniform authorities that such privilege from arrest does not exempt from service of process without arrest are collected in a very recent and able opinion (1903) in *Berlet v. Weary*, 93 N. W., 238 (Neb.); 60 L. R. A., 609; and in *Rhodés v. Walsh*, 55 Minn., 542; 23 L. R. A., 632; *Gentry v. Griffith*, 27 Tex., 461. For a stronger reason this is so where, as in most States as well as in this, lawyers are not exempt even from arrest. In *Lyall v. Goodwin*, 4 McLean, 29, a service of a summons from a United States Court upon a judge of the State Supreme Court, in his own court and while actually on duty, was set aside because being a supposed indignity to the court and interference with its business. Even if this can be sustained and extended to counsel, neither the dignity of the court nor the despatch of business in this case could be interfered with by the service of summons upon Morey at the hotel.

Nor, in the nature of things, is there any reason why a non-resident lawyer, coming here for a consideration in the pursuit of his profession, should be exempt from the service of summons any more than a non-resident physician or minister or a member of any other calling. The plaintiff sues for services rendered to the defendants in this State at their request. If Morey is exempt from service because here in the exercise of his profession, a "commercial tourist" is by the same right exempt from being served with summons in an action for a hotel bill incurred while prosecuting *his* calling. Indeed, his ground for exemption would be more plausible, for he is engaged in interstate commerce and the lawyer is not. Service of summons upon neither will interfere with the dignity of the courts or their despatch of business. Our State extends no preference to non-resident lawyers over those living here. The Code, secs. 18 and 19; *Manning v. Railroad*, 122 N. C., p. 828.

As far back as 1769 (10 George III., ch. 50), England passed a statute confirming the ruling of Sir Orlando Bridgeman in *Benyon v. Evelyn Tr.*, 14 Car., 2 C. B. Roll, over a century before (1661), and cited in *Knowles' Case*, 12 Mod., at p. 64 (1694), that the privilege which members

of Parliament enjoyed of being exempt from arrest did not exempt them from being sued or from service of ordinary process without arrest. The privilege was deemed too invidious a class privilege even for that age and country, and the claim was denied by Parliament itself and the contention put at rest. *Cassidey v. Stewart*, 2 Man. & G. 437. It is not for an American court to reverse the process and hold that because lawyers were formerly privileged from arrest during attendance upon court, therefore, they are exempt from being sued and being served with a summons. By the census of 1900 there were 114,703 practicing lawyers in the United States, of whom 1,263 were in North Carolina. If, during all these years, lawyers had possessed the privilege of exemption from the service of summons, assuredly more than one case could be found to assert it. If it had been so asserted it would have been promptly repealed by statute, seeing that the Parliament in England passed an act denying a similar claim that its own members were exempt from service of summons because privileged from arrest, and that members and Senators in Congress are not privileged from service of summons, though expressly exempted from arrest on civil process by the Constitution. Even the former privilege of lawyers from arrest has been modified in some States and expressly repealed in others, and in others still, as in North Carolina, it has never been recognized or acknowledged.

Equally unfounded is the claim that service upon the other defendant, the officer of a corporation (*Jester v. Steam Packet Co.*, 131 N. C., 54), was invalid because made when he was attending a sale of land under a decree of court. Such sale may, like other acts, come before a court for review, but the sale itself is not a judicial proceeding, and no exemption from service of process extends to it. Such exemptions are restricted to non-resident witnesses and parties, and are permitted, not on their own account or for their own benefit, but for the benefit of the court in obtaining *evidence at a trial*, when the court cannot *compel* the presence of those who can testify to facts in issue in the litigation. This can have no application to the attendance of a party at a sale, under a decree in the cause, for his own convenience or benefit.

In the days of Privilege, under the rule of Ecclesiastics

in England, they held their own profession exempt from the jurisdiction of the civil courts, and set apart certain places where all men were exempt from service of process under the "Privilege of Sanctuary." The last remnant of such class privileges was repealed. 21 James I. Judges have never claimed for the legal profession or the courts any similar exemption, either as to persons or places. With lawyers for judges, justice knows neither class nor caste, and admits no special privileges, and for its administration "every place is a temple and all seasons summer."

The judgment setting aside the service of summons must be reversed.

DOUGLAS, J., concurs in the above concurring opinion.

CHAPTER III.

APPEARANCE.

SECTION 1. WHAT CONSTITUTES A SPECIAL APPEARANCE.

BELKNAP V. CHARLTON.

Supreme Court of Oregon. 1893.

25 Oregon, 41.

This action was commenced by H. A. Belknap, H. P. Belknap and S. I. Belknap, partners, in the Circuit Court for Crook county against C. M. and Mamie Charlton, residents of Morrow county, to recover the sum of sixty-one dollars and twenty cents upon an account for goods, wares, and merchandise sold and delivered, and for services rendered. A writ of attachment was duly issued and served in Crook county by attaching in the hands of one J. F. Moore certain moneys belonging to the defendants, but the summons in the action was not served on the defendants. Some three months after the action was commenced, and the writ of attachment had been served, the defendants appeared specially by their attorney for the purpose of applying to the court to discharge the attachment because the action had been commenced in the wrong county, and because no service had been made upon them, which motion being overruled, judgment was rendered against them by default. They now appeal, claiming that such appearance, being special, gave the court no jurisdiction to render a judgment against them. Reversed.

Opinion by MR. JUSTICE BEAN.

1. It is admitted that the voluntary appearance of a defendant in an action is equivalent to the service of a summons, and waives all defects in the process (Code, § 62), but the contention for defendant is that no appearance, except as provided in section 530 of the Code,—that is, either by answer, demurrer, or giving plaintiff written notice,—can be deemed an appearance within the meaning of

section 62 of our Code. Section 530 provides, that a defendant appears in an action when he answers, demurs, or gives plaintiff written notice of his appearance, and until he does so appear he shall not be entitled to be heard, or be served with notice of subsequent proceedings in such action or suit, or in any proceeding pertaining thereto, except the giving of an undertaking in the provisional remedies of arrest, attachment, or the delivery of personal property. The arrangement of this section in the Code under the title of "Notices and Service and Filing of Papers," as well as its language, indicates clearly that its only purpose is to define what shall constitute such an appearance in an action as will entitle the defendant to be heard, as a matter of right, and entitle him to the service of notice of motions and subsequent proceedings in the action required by law to be served: *Bank v. Rogers*, 12 Minn., 529; *Grant v. Schmidt*, 22 Minn., 1. It was not, we think, intended to define a voluntary appearance within the meaning of section 62, and has no bearing upon the question of jurisdiction. A defendant may appear and submit himself to the jurisdiction of the court in many ways, without either answering, demurring, or giving plaintiff written notice of his appearance. He may do this by appearing in person, or by attorney in open court, by attacking the complaint by motion, or by an application for a continuance, and in many other ways which will readily suggest themselves to one familiar with the course of judicial proceedings. But before he is entitled, as a matter of right, to be heard in the action, or in any proceedings pertaining thereto, or to be served with notice, he must appear in one of the ways provided in section 530. The question before us, therefore, must be determined without reference to that section, which, as we conceive, has no bearing upon the question as to whether a special appearance for the purpose of applying for the discharge of an attachment is a submission to the jurisdiction of the court so as to authorize it to proceed to judgment in the action without the service of summons.

2. It is claimed by the plaintiffs that while a defendant may appear specially to object to the jurisdiction of the court over him on account of the illegal service of process, (*Kinkade v. Myers*, 17 Or. 470, 21 Pac. Rep. 557), he must keep out of court for every other purpose, and that any

appearance which calls into action the power of the court for any purpose except to decide upon its own jurisdiction, is a general appearance, and waives all defects in the service of process, and many authorities are cited to sustain this position. The principle to be extracted from the decisions on this subject is, that where the defendant appears and asks some relief which can be granted only on the hypothesis that the court has jurisdiction of the cause and the person, it is a submission to the jurisdiction of the court as completely as if he had been regularly served with process, whether such an appearance by its terms be limited to a special purpose or not: *Coad v. Coad*, 41 Wis. 26; *Blackburn v. Sweet*, 38 Wis., 578; *Pry v. Hannibal & St. Jo. R. R. Co.*, 73 Mo., 126; *Sargent v. Flaid*, 90 Ind., 501; *Layne v. Ohio River R. R. Co.*, 35 W. Va. 438, 14 S. E. Rep. 123; *Handy v. Ins. Co.*, 37 Ohio St., 366; *Bucklin v. Strickler*, 32 Neb., 602, 49 N. W. Rep., 371; *Burdette v. Corgan*, 26 Kansas, 102; *Aultman & Taylor Co. v. Steinan*, 8 Neb., 109. This seems to be a reasonable rule, and one which will adequately protect the rights of the parties, and it determines the effect of defendant's appearance from the nature of the relief which he seeks to obtain. If he asks the court to adjudicate upon some question affecting the merits of the controversy, or for some relief which presupposes jurisdiction of the person, and which can be granted only after jurisdiction is acquired, he will be deemed to have made a general appearance, and to have submitted himself to the jurisdiction of the court, and cannot, by any act of his, limit his appearance to a special purpose. But, if granting the relief asked would be consistent with a want of jurisdiction over the person, he may appear for a special purpose without submitting himself to the jurisdiction of the court for any other purpose. It has consequently been held that an attachment and the action out of which it issues, are so inseparately connected that the defendant cannot appear and question the validity of the attachment by a traverse of the facts alleged in the affidavit, or by contesting the truth of the grounds upon which it issued, without submitting himself to the jurisdiction of the court in the action, because by so doing the court is called upon to entertain and determine questions which can be considered only after jurisdiction has at-

tached: *Greenwell v. Greenwell*, 26 Kan. 530; *Bury v. Conklin*, 23 Kan., 460; *Wood v. Young*, 38 Iowa, 102; *Duncan v. Wickliffe*, 4 Met. (Ky.) 118. But where a defendant appears, and without questioning the merits of the action, or the truth of the grounds upon which the attachment issued, moves to discharge the attachment for want of the jurisdictional facts to sustain it, he asks no relief the granting of which would be inconsistent with an entire want of jurisdiction over the person, and hence does not appear in the action so as to authorize the court to proceed to judgment against him: *Drake, Attach.* § 112; *Glidden v. Packard*, 28 Cal., 649; *Johnson v. Buell*, 26 Ill., 66; *Bonner v. Brown*, 10 La. Ann. 334.

Now, in the case at bar, the appearance of the defendants was not for the purpose of contesting the truth of the grounds upon which the attachment issued, or the merits of the action, but to vacate the attachment for the reason, as appears from the affidavit accompanying the motion, that the action had been commenced in the wrong county, and that it was a great injustice and wrong to them to have their property thus held under an attachment when there was no means of obtaining jurisdiction over their persons. This appearance was, therefore, not for the purpose of submitting to the jurisdiction of the court, or asking it to entertain or determine any question which could only be considered after jurisdiction had attached, but it was for the sole purpose of objecting to the validity of the attachment for irregularities in the proceedings, the granting of which would have been entirely consistent with the claim that the court had no jurisdiction of the person. By their motion to discharge the attachment for the reason stated, the defendants appeared for no purpose incompatible with the supposition that the court had acquired no jurisdiction over them on account of a want of service of the summons, and we therefore think there was no waiver of process. Nothing less than the express language of a statute, or the necessary implication therefrom, or the overbearing weight of authority, will justify a court in holding that a defendant in an action commenced in the wrong county, in violation of section 44 of the Code, could not appear and apply for the discharge of an attachment against his property, for irregularities, without being required to submit

himself to the jurisdiction of the court for the purpose of the entire action; and it is not material in such case, whether the motion happened to be well founded or not, but the question is, did it go to the merits, or was it based upon some technical grounds supposed to be sufficient to render the attachment invalid. If a defendant may not thus appear and resist what he supposes to be a wrongful attachment without subjecting his person to the jurisdiction of the court, he must either suffer his property to be held under a pretended attachment for an indefinite time, or waive a statutory right to be sued in the county where he resides or may be found. This the law will not exact or require.

4. It was suggested that the remedy of the defendants in such case is by motion to dismiss the action for want of jurisdiction, but such a motion would be unavailing. The court has jurisdiction of the subject-matter, and an action is commenced by filing the complaint, and there is no provision of the law authorizing it to be dismissed because the summons has not been served: Code, § § 51, 59. It follows, therefore, that the action of the court below in entering judgment against the defendants without service of process upon them was unauthorized, and the judgment must be reversed.

Reversed.

FULTON V. RAMSEY.

Supreme Court of Appeals of West Virginia. 1910.

67 West Virginia, 321.

POFFENBARGER, J. The sole question in this cause, namely, whether Joseph Ramsey, Jr., George J. Gould, and William E. Guy, non-resident defendants, proceeded against by order of publication, appeared herein, in the court below, by attorneys, so as to enable that court to render a personal decree against them, grows out of the operations of what is styled in an agreement, and popularly known, as "the Little Kanawha Syndicate," which agreement is dated De-

cember 2, 1901, and was signed by said Ramsey, Gould, Guy, and others.

That syndicate seems to have been formed for the purpose of purchasing the Little Kanawha Railroad, large areas of coal lands, and other properties in this state. * * *

In anticipation of the launching of this enterprise, Mr. Edward D. Fulton had acquired an option on the Little Kanawha Railroad as well as the title to, and options upon, large areas of coal and coal lands and other property in the counties of Braxton, Gilmer, and Lewis. Under certain agreements, and with intent to dispose of the same to the syndicate, he assigned the option on the railroad, at the option price, and assigned his coal and coal land options, and conveyed his coal and coal lands, at certain prices named in the assignments and deeds, to the St. Louis Union Trust Company, to hold as trustee for the syndicate. For some reason, the syndicate concluded to abandon its plan and sell all its property. Accordingly, it failed to carry out its contemplated arrangements with Fulton, and he brought this suit, in the Circuit Court of Braxton county, to compel specific performance of his alleged contract with the syndicate. * * *

On the 1st day of December, 1908, the following order, relied upon by Fulton as showing a general appearance, was entered: "This day R. W. McMichael and John B. Morrison, attorneys practicing in this court, appeared and asked the court to permit them to appear specially for Joseph Ramsey, Jr., George J. Gould, and William E. Guy, as managers of the Little Kanawha Syndicate, and ask a continuance of this cause for thirty or sixty days to enable them to prepare their defense, or to determine whether they would desire to appear generally, and stating that they did not desire to appear generally for said parties at this time, but that they desired to move the court to continue the cause without appearance other than specially for the purposes of the continuance. The plaintiff, by his counsel, resisted the said motion to continue the hearing, and thereupon said counsel for said defendants Ramsey, Gould, and Guy, announced that it was their desire to withdraw and not appear to the case, and thereupon counsel for plaintiff, and while said counsel for defendants were present, asked that the cause be submitted for hearing and ac-

cordingly the said cause was submitted for hearing." * * *

* * * * *

We think the order was nothing more than an inquiry, addressed to the court, for information as to what could be done by way of obtaining a postponement of action in the cause, without submitting to the jurisdiction of the court for all purposes, or a conditional, not an absolute and unqualified, motion for a continuance. The motion, as recorded, if it can be regarded as a motion, signified a desire for a continuance, if it could be had without a waiver of service of process upon the defendants, but distinctly declared unwillingness to ask or take a continuance, if it involved such a waiver. It does not say in express terms that a motion to continue was made. On the contrary, it says McMichael and Morrison asked the court to permit them to appear specially for their clients and ask a continuance, to enable them to determine whether they would desire to appear generally, and stated that they did not desire to appear generally at that time. It then says counsel for plaintiff resisted "said motion to continue." That means the motion or request made. It was not in terms a motion, and, read in the light of the protest, submitted along with it, it cannot be regarded as anything more, in substance and effect, than an offer to move for a continuance, if it could be done without waiving process, accompanied by a declaration of intent not to move at all, if such action involved waiver, and an immediate declaration of determination not to say or do anything more, after having been informed that a motion for a continuance, so made and described upon the record, would be in law a submission to the jurisdiction of the court.

We apprehend no dissent from the proposition that the establishment of the jurisdiction of a court, whether over the person or the subject matter, must be affirmatively shown by the record. *Groves v. Grant County Court*, 42 W. Va., 587, 600, 26 S. E. 460. Something must be done to confer it. Jurisdiction of the person may be acquired by implication, arising out of some act done, or by direct and positive acknowledgement thereof; but in either event it should clearly appear. It ought to be reasonably free from uncertainty and doubt. A favorite statement of the rule, respecting the acquisition of jurisdiction by implication or

waiver, is this: "By appearance to the action in any case, for any other purpose than to take advantage of the defective execution, or non-execution, of process, a defendant places himself precisely in the situation in which he would be if process were executed upon him, and he thereby waives all objection to the defective execution or non-execution of process upon him." *State v. Coal Co.*, 49 W. Va. 143, 38 S. E. 539; *Lumber Co. v. Lance*, 50 W. Va. 640, 41 S. E. 128; *Layne v. Railroad Co.*, 35 W. Va. 438, 14 S. E. 123; *Blankenship v. Railway Co.*, 43 W. Va. 135, 27 S. E. 355; *Mahany v. Kephart*, 15 W. Va. 609; *Bank v. Bank*, 3 W. Va. 386. This is a declaration of a general principle, to be read in the light of the facts and circumstances under which it is applied, in seeking its true meaning. Some attention must also be paid to its terms. It must be an appearance for a purpose in the cause, not one merely collateral to it. In this state, litigants have put themselves within this rule, for the most part, by asking or accepting some sort of relief in the cause, consistent with the hypothesis of a submission and inconsistent with any other view, such as a continuance. No instance can be found in which a party has been held to have impliedly bound himself to submission, without having asked or received some relief in the cause or participated in some step taken therein. Mere presence in the court room when the case is called, or examination of the papers in it filed in the clerk's office, is not enough. Nor could a conversation with plaintiff's counsel or the judge of the court, about the case, be regarded as an appearance. No decision goes that far. Under this text in 3 Cyc. 504, "Any action on the part of defendant, except to object to the jurisdiction, which recognizes the case as in court, will amount to a general appearance," a long list of decisions is cited, but, in every one of them, something was done in the cause—some affirmative act was done to delay, speed, or defend the cause. In every instance the conduct, deemed a waiver, amounted to more than a mere inquiry or conversation about it. The test, according to a late decision of the Federal Supreme Court (*Merchant's Heat & Light Co. v. Clow & Sons*, 204 U. S. 286, 27 Sup. Ct. 285), is whether the defendant became an actor in the cause. The instances of the assumption of the role of actor in a suit disclosed by the federal decisions, are such as the taking

of a continuance; filing a demurrer to plaintiff's pleadings, without limiting it to the question of jurisdiction; filing a plea of intervention, pleading to issue or to the merits in the first instance; or filing sets-off, counter-claims, or notices of recoupment. Broad as is this doctrine of waiver, it does not cover all acts done by a defendant. He may talk even to the court about the merits of the cause without subjecting himself to it. In *Citizens' Saving & Trust Co. v. Railroad Co.*, 205 U. S. 46, 27 Sup. Ct. 425, argument upon the merits of the cause was indulged in, at the hearing upon the sufficiency of the pleas to the jurisdiction, and this was relied upon as constituting a general appearance; but Mr. Justice HARLAN, speaking for the court, said: "This is too harsh an interpretation of what occurred in the court below. There was no motion for the dismissal of the bill for want of equity. The discussion of the merits was permitted or invited by the court in order that it might be informed on that question in the event it concluded to consider the merits along with the question of the sufficiency of the pleas to the jurisdiction. We are satisfied that the defendants did not intend to waive the benefit of their qualified appearance at the time of filing the pleas to the jurisdiction." * * * In *Fairbank & Co. v. Cincinnati, etc., Ry. Co.*, 54 Fed. 420, 4 C. C. A. 403, 38 L. R. A. 271, the court held as follows: "Where a defendant appears specially for the purpose of moving to quash the return on the summons, the fact that, in such motion, it also prays judgment whether it should be compelled to plead, for the reason that it is a non-resident corporation, does not constitute a waiver of the objection to the service." These precedents amply sustain the view that something substantially beneficial to the defendant or detrimental to the plaintiff, relating to or affecting the progress of the cause, asked, done, or accepted by the former, is essential to the establishment of a waiver of process or service thereof. There must be something more than a mere pretext for the claim of jurisdiction over him. He must either enter an appearance, ask some relief in the cause, accept some benefit as a step therein or do something from which the necessary implication of submission to the jurisdiction of the court over his person arises. "The principle to be extracted from the decisions on the subject as to when a special appearance is converted

into a general one is that, where the defendant appears and asks some relief which can only be granted on the hypothesis that the court has jurisdiction of the cause and the person, it is a submission to the jurisdiction of the court as completely as if he had been regularly served with process, whether such an appearance, by its terms, be limited to a special purpose or not." 2 Ency. Pl. & Pr. 625. "The expression 'for any purpose connected with the cause,' however, is not to be taken as wholly unrestricted in meaning. The appearance must have some relation to the merits of the controversy, and the purpose must be to invoke some action on the part of the court having direct bearing in some way upon the question of the judgment or decree proper to be entered." *Bank v. Knox*, 133 Iowa, 443, 446, 109 N. W. 201. The general principle, upon which we rely, was applied by the Supreme Court of Massachusetts in *Lowrie v. Castle*, 198 Mass. 82, 83 N. E. 1118, under circumstances even more unfavorable to the defendant than those presented here. The non-resident defendant in that case, within 10 days after the return day of the writ, applied to the court for an extension of the time within which he could appear, in order that he might decide whether to waive the lack of proper service and voluntarily appear, or to insist upon his rights as a non-resident, and the court allowed such extension. After the expiration of the 10 days, but within the period of the extension allowed, he moved to dismiss the action, stating in his motion that he appeared only for the purpose of moving a dismissal, and the motion was sustained. The appellate court held it to be within the inherent power of the trial court to grant such an extension, without prejudice to the right to except to the jurisdiction, and affirmed the judgment of dismissal. In delivering the opinion of the court, HAMMOND, Judge, said: "It is to be borne in mind that this is not a case where a defendant, upon whom process has been duly served, and who, therefore, is within the jurisdiction of the court and liable to default if he does not seasonably appear, asks for delay. It is a case where a non-resident defendant who, for lack of service upon him, is not within the jurisdiction and cannot be brought within it, fearing lest the court may regard the service sufficient and default him, comes into court, and says, in substance, that he is in doubt whether to waive

proper service and voluntarily appear, or to insist upon his rights as a non-resident, and ask for time to decide. Certainly it is a part of the inherent power in a court to set a time within which the non-resident must make up his mind and act accordingly, and that was all the court did. The motions for dismissal were properly before the court.” Against this express decision of a reputable and able court, under a state of facts less favorable to the defendant than those presented here, and other decisions, showing that something substantial must be asked or done by the defendant, relating to or affecting the merits of the cause, we have nothing but a generalization, founded upon, and, therefore, to be interpreted by, facts falling far short of those disclosed here, for the proposition that [a defendant, who makes]¹ a mere offer to move for a continuance provided it can be done without a waiver of service, accompanied by his declaration of intention not to appear generally nor to ask or take such continuance, if it involved such waiver, and signification of his desire and determination to withdraw the request, for nothing but a request had been made, on being informed that such a motion would be a general appearance, is bound thereby. We feel amply justified, upon authority as well as upon reason and principle, in withholding our assent to it, and saying such action did not constitute a general appearance. * * *

Affirmed.

[BRANNON and WILLIAMS, J. J., dissent.]

¹There appears to be a misprint in the published opinion, which is here sought to be corrected by introducing the words inclosed in brackets.

SECTION 2. MANNER OF MAKING SPECIAL APPEARANCE.

WALL V. CHESAPEAKE & OHIO RAILWAY
COMPANY.

*United States Circuit Court of Appeals, Seventh
Circuit. 1899.*

37 Circuit Court of Appeals, 129.

BUNN, District Judge. * * * The summons issued by the Superior Court of Cook county was returned with an indorsement of service as follows:

“Served this writ on the within-named Chesapeake & Ohio Railway Company, a corporation, by delivering a copy thereof to U. L. Truitt, the northwestern passenger agent of said corporation, this 12th day of April, 1898. The president of said corporation not found in my county.

“JAMES PEASE, Sheriff.

“By B. Gilbert, Deputy.”

After this return was made, and the declaration filed, the defendant proceeded to remove the case to the United States Circuit Court for the northern district of Illinois, and, when so removed, entered its special appearance for the purpose of moving to set aside the return of the summons on the ground that U. L. Truitt, the person on whom it was served, was not the defendant's agent, or a person on whom proper service of summons could be made. The motion to set aside was founded upon the affidavits of Ulysses L. Truitt and H. W. Fuller, the general passenger agent of the defendant, setting forth that at the time of the service Truitt was in the employ of the defendant company for the purpose of influencing persons who might be desirous of travelling from Chicago and vicinity to points east of Cincinnati and Lexington to patronize those railway lines leading out of Chicago that made connections with defendant's road at Cincinnati and Lexington; that Truitt had no other connection with the defendant, and had no power or authority from said defendant, either express or implied, to make any contract or rates for transportation over the railway of the defendant, and that his authority was strictly limited to conveying information concerning

existing rates as established by the officials of the defendant company, and concerning the connections and time made and facilities possessed by the defendant in and about its passenger traffic, and had no other authority whatever; that the defendant was a resident of the state of Virginia, having its principal office at Richmond, in that state, and was not operating any railway in said county of Cook, and had no place of business therein. Upon these affidavits (no counter affidavits being filed) the court below, by its order, set aside the service of the summons, to which ruling the plaintiff duly excepted. * * * * *

The contention is that the practice adopted to get rid of the service by motion to quash and set aside was irregular and unjustified in law, and that, instead of proceeding by motion, the defendant should have filed a plea in abatement, and had a trial of the question by a jury. This is an important and radical contention, and the ground upon which it is sought to support it is that it is the practice in such cases recognized and established by the Supreme Court of the state of Illinois. That court first made such a ruling in *Railway Co. v. Keep*, 22 Ill. 9, and has in numerous decisions since adhered to it, and it is contended that this court should follow the state practice. But this contention cannot be supported, either upon reason or authority.

* * * * *

Under these decisions, it is evident that the law vests a reasonable discretion in the federal courts to judge in any given case how far they will feel bound to follow the practice or decisions of the state courts. There can be no doubt that the rule upon this question of practice prevailing in the Illinois state courts is contrary to the general rule on the subject in this country, as well as in England. There is no more reason for requiring a plea in abatement and a jury trial to test the question of a sufficient service of a summons than there would be to require the same proceeding, including a jury trial, in all cases where now a motion is held to be the proper remedy. The constitutional right to a jury trial obtains whenever there is any question at issue involving the life, liberty, or property of the citizen. But a motion to quash a service of summons, or any other process or order, for insufficiency in the service, involves no such substantial right. The setting aside of service

does not affect the writ or the status of the action in court. Another service can be made, and the action proceed. If the original process were exhausted, a new summons could be issued. If the objection were to the writ itself, a plea in abatement would be the proper remedy, the office of which is to give the plaintiff a better writ. 1 Chitty Pl. 446-457. But here the plaintiff still has his writ. The order only sets aside the service, as being unwarranted and insufficient in law. No substantial right is affected by the decision. There are many matters pending in the progress of a case which are daily determined upon motion that are much more important in affecting substantial rights than a motion to set aside an irregular service of process. Take, for instance, the motion for a new trial upon newly discovered evidence after the plaintiff has recovered a substantial verdict. The court, in its discretion, may set aside the verdict upon a motion. Whether the plaintiff will ever be able to obtain another is uncertain, and yet no one would think of objecting to trying such a question before the court upon motion supported and opposed by affidavits.

The practice in the United States Circuit Court for this circuit was fairly well established by precedent when this action was begun. So that if the defendant had resorted to a plea in abatement, instead of making a motion, he would have subjected himself to the criticism that he was departing from the usual practice adopted in such cases. In *Fairbank & Co. v. Cincinnati, N. O. & T. P. Ry. Co.*, *supra*, [9 U. S. App. 212, 4 C. C. A. 403, 54 Fed. 420] a similar motion was made and heard before Judge Blodgett at the circuit without question as to the propriety of the practice, and an order made quashing the service. Judge Blodgett delivered an opinion, holding the service insufficient, which was affirmed by this court, where no question was made as to the proper practice being by motion. In *American Cereal Co. v. Eli Pettijohn Cereal Co.*, 70 Fed. 276, the same practice was adopted, and the service set aside upon motion; Judge Showalter delivering an opinion justifying the practice, and giving good and sufficient reason for it, as follows:

“The determining consideration is that the matter at issue, however it may result, will not end the suit. If

found against the defendant, the defendant is in court and must plead; if in favor of the defendant, the return of the writ is vacated or quashed, and the suit remains pending; whereas a plea, either in abatement or in bar, if made out by proofs, puts an end to the proceeding. The view that a motion to be determined upon affidavits is the proper practice in such cases is sustained by English decisions,"—citing *Hemp v. Warren*, 2 Dowl. (N. S.) 758; *Preston v. Lamont*, 1 Exch. Div. 361.

In the last of the above-named English cases, Amphlett, B., in a concurring opinion, gives the reason for having the question of service determined summarily upon motion, instead of by plea, as follows:

"The decision of the judge at chambers can be contested on appeal, and, if necessary, in the house of lords. There is convenience in this, because it is a speedy and inexpensive mode of determining that question before any expense is incurred upon the merits of the action, whereas, if the question may be raised by plea, all the expenses of the action may be thrown away * * * Convenience and justice, I think, require that this question should not be the subject of a plea."

In the state courts in this country, while some question has been made as to the conclusiveness of the sheriff's return, it has generally been held, that it is only prima facie true, and that the truth or falsity of the return may be determined upon motion supported by affidavit. The rule in England at the common law was that the sheriff's return was conclusive and could not be disputed, and the defendant's only remedy was by an action against the sheriff for a false return. But in this country, where we have so many different codes of practice, and so many kinds of substituted service, such a rule would be inconvenient, unjust, and impracticable. Upon examination of a great many American cases, we believe the general rule in this country, with some dissenting cases like those in Illinois, to be this: That the sheriff's return stands in the first instance as the affidavit of the sheriff, but is subject to be disputed by affidavits on the part of the defendant showing to the satisfaction of the court, upon motion to quash, that the return is not true in point of fact, or, as in the case at bar, is insufficient in law. *Carr v. Bank*, 16 Wis.

50; *Bond v. Wilson*, 8 Kan. 228; *Crosby v. Farmer*, 39 Minn. 305, 40 N. W. 71; *Walker v. Lutz*, 14 Neb. 274, 15 N. W. 352; *Wendell v. Mugridge*, 19 N. H. 109; *Stout v. Railroad Co.*, 3 McCrary 1, 8 Fed. 794; *Van Rensselaer v. Chadwick*, 7 How. Prac. 297; *Wallis v. Lott*, 15 How. Prac. 567; *Watson v. Watson*, 6 Conn. 334; *Rowe v. Water Co.*, 10 Cal. 442. In this case the sheriff returned that he had made service upon U. L. Truitt, Northwestern passenger agent of the defendant. If this return had been true, the service would have been good. But it is very clear from the affidavits filed that it was not true. Truitt was not Northwestern passenger agent of the company, or any other agent, but a mere employe for a certain purpose. The sheriff was mistaken, and there was no need to resort to the clumsy method of a plea in abatement and a trial by jury to ascertain this fact.

It has been suggested that, allowing the practice by motion to be correct and preferable, still, in analogy to the practice under a plea in abatement of giving the plaintiff a better writ, the defendant should state in his affidavits on whom the summons may be properly served, or, if there be no such person in the district, to state that fact. No authority is cited for such a rule, and we have searched in vain for a precedent to warrant it. * * * There is no suggestion in any of the adjudicated cases that this doctrine has any application to a motion to set aside service. It only applies to a plea in abatement where the objection is to the writ itself. * * * The judgment of the circuit court is affirmed.

[Dissenting opinion filed by Woods, Circuit Judge.]

GREER V. YOUNG.

Supreme Court of Illinois. 1887.

120 Illinois, 184.

MR. JUSTICE MULKEY delivered the opinion of the Court: Robert C. Greer, on the 23rd of July, 1884, commenced an action of assumpsit in the Superior Court of Cook county,

against George Young. A summons in the usual form, returnable on the first Monday of the following month, was served on the defendant, and due return thereof made by the sheriff of Cook county, on the same day. On the 4th of August, 1884, the plaintiff filed in the cause a declaration in the usual form, containing the common counts only. On the 18th of the same month, the defendant filed, by his attorneys a special appearance in the case, "for the purpose, only, of moving to quash the writ of summons, and dismiss the suit." On the 19th of the same month the defendant filed a written motion in the cause, "to quash the service of the writ of summons," for the reason, as is alleged in the motion, "that the defendant is a non-resident of the State of Illinois, and at the time of said service was within the jurisdiction of this court for the purpose of attending legal proceedings, and for no other purpose." This motion was supported by an affidavit of the defendant, showing, in substance, that both the plaintiff and the defendant were residents of Missouri; that the plaintiff, prior to the commencement of the present suit, had brought an action against the defendant, in the circuit court of Lafayette county, in the State of Missouri, "for the identical cause of action for which this suit is brought," and that said former suit was still pending and undetermined in the State of Missouri; that in defending said last mentioned suit, it became necessary to take depositions in Chicago, and that, under the instructions of his attorneys, he went to Chicago for the sole purpose of assisting his said attorneys in taking said depositions; that shortly after the taking of the same, and while in the office of his attorneys, consulting with them as to the probable effect of the depositions, the sheriff made service of the summons upon him in the present case.

Upon consideration of the facts set forth in the affidavit, the Superior Court sustained the motion to quash the service, and entered an order dismissing the suit, which was affirmed by the Appellate Court for the First District. The case is brought here by plaintiff in error on a certificate of the Appellate Court, and a reversal of the judgment of affirmance is asked on a number of grounds.

It is first contended, that as the defence was of a dilatory character, it should have been made at the very earliest

opportunity, which it is claimed was not done. Of the correctness of the rule of law suggested there can be no question; but whether the motion was made at the earliest opportunity, is a question of fact, that may be materially affected by the rules of the court where the action was pending, of which this court can not take judicial notice, and as all presumptions are to be indulged in favor of the correctness of the rulings of that court, in the absence of anything to the contrary, we are not fully prepared to say that the motion was not made in time, though it must be confessed the objection is not without force. However this may be, we prefer to place our decision upon other grounds.

The most important question in the case, is whether the circumstances shown, even if properly pleaded in due time, warranted the court in setting aside the service of the process and dismissing the suit. There is clearly no ground for the claim that the plaintiff or his counsel had any agency in inducing the defendant to leave Missouri and go to Chicago, for the purpose of having process served on him in the latter place,—in other words, it is not claimed, nor is there any ground for the claim, that service of process upon the defendant was obtained by any artifice, trick, or fraud, on the part of the plaintiff, his counsel, or any one else acting in his interest. The question then arises, can one who voluntarily leaves his own State, and comes to this, for the purpose of taking depositions before a notary, be lawfully served, by reading, with civil process, while here on such business?

The fact that the plaintiff had sued the defendant in Missouri, on the same cause of action, we do not regard as having any bearing on the question, as it is the settled law in this State, that the pendency of a suit in another State can not be pleaded in abatement of a suit brought here on the same cause of action. (*McJilton v. Love*, 13 Ill. 486; *Allen v. Watt*, 69 id. 655.) But even where the pendency of a suit in a sister State can be made available as a defence at all it must, by all the authorities, be formally pleaded in abatement, which was not done here. The right of the plaintiff then, to sue the defendant here, was the same as that of any one else having a claim against him. The ruling of the court, therefore, must be rested entirely upon the privi-

lege or immunity which the common law has, from a very early period, extended to parties and witnesses in a lawsuit while attending court, including going and coming. This rule is found in all the text books, and, in most of the cases we have examined, is expressly limited to cases of *arrest* on civil process. 1 Tidd, (1st Am. ed.) 174; 3 Blackstone, side page 289; 1 Greenleaf on Evidence, secs. 316, 317; 2 Bouvier's Law Dic. 284.

The rule as laid down in the above works, is fully sustained by an almost unbroken current of authority, as is fully shown by the following cases: *Meckius v. Smith*, 1 H. Blac. 635; *Kinder v. Williams*, 4 Term Rep. 378; *Arding v. Flower*, 8 id. 534; *Spence v. Bert*, 3 East, 89; *More v. Booth*, 3 Ves. 350; *Ex parte Hawkins*, 4 id. 691; *Ex parte King*, 7 id. 313; *Sidgier v. Birch*, 9 id. 69; *Ex parte Jackson*, 15 id. 117.

The above authorities are also valuable as throwing light upon the procedure or practice in cases of this kind. The arrest of a party to a suit, by civil process, being regarded as a breach of the defendant's privilege, the usual course was to appear in the cause in which the arrest was made, and procure a rule against the plaintiff and his attorney to show cause why the defendant should not be discharged out of custody by reason of his alleged privilege, *upon his filing common bail*. The rule to show cause was always supported by affidavit setting up the fact of the arrest, and attendant circumstances. On the hearing, the rule, depending upon the proofs, was either made absolute or discharged. If the former, the defendant, upon filing common or nominal bail, was discharged, and if he had given special bail, the bail bond was ordered to be surrendered and cancelled. Nevertheless, the defendant was in court, and was bound to answer the action.

While, as we have just seen, the exemption, by the general current of authority, applies only to arrests, yet in some of the States, notably New York, it has been extended to cases of service by summons, merely, particularly where the defendant is a non-resident. (*Person v. Grier*, 66 N.Y. 124; *Mathews v. Tufts*, 87 id. 568.) No sufficient reason is perceived for departing from the general current of authority on this subject, merely because some two or three of the States have, through perhaps a spirit of comity, more

than anything else seen proper to do so. The mere service of a summons upon a non-resident, when in another State for the purpose of taking depositions to be used in an action to which he is a party in his own State, imposes no greater hardship upon him than to be served with process out of his own State when attending to any other kind of business. In either case, he is usually afforded ample time to prepare his defence, if he has any. Parties thus circumstanced have no difficulty in getting a temporary postponement or continuance of the causes, when necessary to the attainment of justice, or to avert any serious loss or inconvenience. It is clear that such a case does not come within the reasons of the rule as laid down in the authorities above cited.

But outside of this consideration, it is essential that the party invoking the protection of the rule should come prepared to show that he is clearly within it. The rule, as well as the principle on which it is founded, is thus expressed by Tidd, *supra*: "The parties to a suit, and their witnesses, are, for the sake of public justice, protected from *arrest* in coming to, attending upon and returning from the court, —or, as it is usually termed, *eundo morando et redeundo*."

The term "court," within the meaning of the rule, has received a very liberal construction. Greenleaf, in section 317, above referred to, thus summarizes the result of the authorities on this subject: "This privilege is granted in all cases where the attendance of the party or witness is given in any matter *pending before a lawful tribunal having jurisdiction of the cause*. Thus, it has been extended to a party attending on an arbitration *under a rule of court*; or on the execution of a writ of inquiry; to a bankrupt and witnesses attending before the commissioners, on notice; and to a witness attending before a magistrate to give his deposition, under an order of court."

To the last instance, given by the author may be added the case of a party, or his witnesses, appearing before a master to give or take testimony, which would fall within the same principle. Where a master, magistrate or other person takes evidence in a cause, under an order of the court wherein the cause is pending, such officer or other person is the mere instrument of the court, and is subject to its orders. In legal effect, such evidence is taken be-

fore the court. But a notary public, when taking depositions in one State to be used in a suit pending in another, can in no sense be regarded as an instrument or agency of the court wherein such suit is pending. Neither the notary, nor any of the parties appearing before him, are answerable to the court for anything said or done while there, the whole matter being outside of its jurisdiction. Not so with a master, magistrate or other person taking evidence under an order of the court within its jurisdiction. In such case, all parties appearing before him for such purpose, if wilfully guilty of any improper conduct, might summarily be attached, brought before the court, and punished as for a contempt in its presence. In taking the depositions, the notary performed purely ministerial functions. He could decide no questions or determine any matter affecting the rights of the parties to the suit, nor was he, as we have just seen, connected with any court or other tribunal having the power to do so. Hence he could in no sense, in the language of Greenleaf, be said to have "jurisdiction of the cause," and therefore he does not fall within the category of any of the tribunals contemplated by the rule in question.

Looking at the action of the trial court from another point of view, we do not think it in harmony with the decisions of this court. The case was disposed of upon a simple motion to quash the service. The writ, the service and return, as they appear of record, were in strict conformity with law, but it was sought to assail the validity of the service on account of certain matters alleged to exist *dehors* the record, and set forth by way of affidavit. This we do not think can be done. Had the defendant been arrested, and it was desired to raise the question of privilege for the purpose of obtaining his discharge, then, in conformity with the well settled practice in such cases, a rule *nisi* should have been taken against the plaintiff, as heretofore indicated, and the question would then properly have been heard on affidavit, as was done in this case. But no such case as the one suggested was before the court. There was simply an attack upon the service, founded upon extrinsic facts. Whatever may be the practice in States where the code system prevails, it is clear the course pursued was not proper. Here, the common law practice prevails generally, except in so far

as it has been modified by legislative enactment, or perhaps, in some instances, by long and uniform custom; but we are aware of no change in the practice, by legislation or otherwise, so far as the procedure in cases of this kind is concerned. The rule, as recognized here in repeated decisions, and which is in strict accord with the common law practice, is, that any defect in the writ, its service or return, which is apparent from an inspection of the record, may properly be taken advantage of by motion, but where the objection is founded upon extrinsic facts the matter must be pleaded in abatement, so that an issue may be made thereon, and tried, if desired, by a jury, like any other issue of fact. If the plaintiff is successful upon such issue, the judgment is *quod recuperet*. It is therefore to him a valuable right to have the issue thus made up and tried. To permit the defendant to try an issue of this kind on affidavit, as was done, gives him a decided advantage, for if he fails, his motion would be simply overruled, and he would still have a right to a trial on the merits. To permit a party to thus speculate on the chance of succeeding on a purely technical ground, without incurring any risk, and without any compensation to the plaintiff in case of failure, is contrary to the spirit of the common law, and is in direct conflict with the decisions of this court. *Holloway v. Freeman*, 22 Ill. 197; *McNab v. Bennett*, 66 id. 157; *Union National Bank v. First National Bank*, 90 id. 56; *Rubel v. Beaver Falls Cutlery Co.*, 22 Fed. Rep. 282; *Holton v. Daly*, 106 Ill. 131; *Hearsay v. Bradbury*, 9 Mass. 96; *Bean v. Parker*, 17 id. 601; *Guild v. Richardson*, 6 Pick. 368; *Charlotte v. Webb*, 7 Vt. 48; *Lillard v. Lillard*, 5 B. Mon. 340.

For the reasons stated, the judgments of the courts below are reversed, and the cause remanded to the Superior Court of Cook county, for further proceedings in conformity with the views here expressed.

Judgment reversed.

SECTION 3. WAIVER OF SPECIAL APPEARANCE.

NEOSHO VALLEY INVESTMENT CO. V. CORNELL.

*Supreme Court of Kansas. 1899.**60 Kansas, 282.*

The opinion of the court was delivered by SMITH, J.:

On January 15, 1897, judgment was rendered in the district court of Bourbon county in favor of plaintiffs below, Carrie A. Cornell and others, against the Neosho Valley Investment Company, for the sum of \$5665, with interest at the rate of ten per cent. per annum and costs, declaring the same to be a first lien upon certain real estate located in said county, and directing foreclosure. Upon the summons in the cause was indorsed the following return:

“Received this summons May 17, 1896; executed it by delivering to the Neosho Valley Investment Company, by delivering a true and certified copy of the within summons to L. M. Bedell, its cashier and treasurer; the president or other chief officer not found in my county. May 19, 1896.

“J. W. Bennett,

“Sheriff Labette County, Kansas.”

The judgment was rendered by default, the investment company making no appearance. On April 19, 1897, the investment company filed its petition for a new trial of the foreclosure case, under section 606 of chapter 95, General Statutes of 1897 (Gen. Stat. 1889, § 4671), wherein it attacked the service of summons in the cause, and alleged that L. M. Bedell, mentioned in the return of the sheriff, was not during the month of May, 1896, nor had he ever been, the cashier of the company, and that the vice-president, secretary and treasurer of the company, during the month of May, 1896, had resided in the city of Chetopa, in Labette county, Kansas.

Coupled with this attack on the service was an allegation in the petition for a new trial in substance as follows: * * that the judgment was taken in fraud of the rights of the company. * * * *

[Proceedings under this petition for a new trial were apparently dropped, and when the sheriff was about to sell

the land upon which the judgment was a lien, this action was commenced by a petition alleging the same facts as the petition for a new trial, an injunction being prayed for. Trial was had and judgment went against the company.]¹

Our view of this case renders it unnecessary to consider the questions raised on the sufficiency of the service of the summons. That question has been put past our consideration by the act of the plaintiff in error. In the petition for a new trial the investment company was not content with an attack upon the service of summons only, but sought to impeach the validity of the judgment on other grounds not jurisdictional in character. This appeal to the court for relief against the judgment, for reasons other than that the court failed to obtain jurisdiction over the person of the party defendant, involved the admission that the judgment was valid, and the plaintiff in error by this act treated it as such. In one paragraph of the petition for a new trial it is alleged that the court was without jurisdiction by reason of a fatal defect in the service. In another paragraph the judgment is attacked on the ground that there was no consideration for the note sued on, etc.

In *Adolph Cohen v. C. B. Trowbridge*, 6 Kan. 385, it is held that the filing of a motion to set aside a judgment, based partly on lack of jurisdiction and partly on error in the judgment itself, is a general appearance. (2 Encycl. Pl. & Pr. 632). Where a party voluntarily appears in court it is unnecessary to inquire what, if any, process has been served upon him. (*Carr v. Catlin*, 13 Kan. 393.) In *Meixell v. Kirkpatrick*, 29 Kan. 679, a party filed a demurrer to the petition upon several grounds, some jurisdictional and some not, claiming that the court had no jurisdiction of the person of the defendant, that the petition did not state facts constituting any cause of action, and that several causes of action were improperly joined. This demurrer was sustained on the ground that several causes of action were improperly joined. Justice Brewer, speaking for the court, said:

“When served with the summons he (the defendant) appeared and filed a demurrer, which, while it alleged a lack of jurisdiction, presented also a number of other defenses, and defenses on the merits. Such plea, by the prior adju

¹Matter within brackets is a condensation by the editor.

dications of this court, was equivalent to an appearance. A party who denies the jurisdiction of a court over his person must first present this single question. He may not mingle with his plea to the jurisdiction other pleas which concede jurisdiction, and thereafter insist that there was error in overruling his plea to the jurisdiction. As heretofore stated, the defendant by his demurrer raised a number of questions other than those which were jurisdictional, and invoked the judgment of the court thereon. By such other pleas he submitted himself and his rights to the jurisdiction of the court, and can no longer be heard to say that it had no jurisdiction."

The plaintiff in error earnestly contends that this petition for a new trial, being filed after judgment, cannot be construed into an entry of appearance in the cause, for the reason that the judgment was originally based upon void service and was wholly inoperative to affect any rights or property of the defendant below. This contention cannot be sustained under the authorities. The case of *Life Association v. Lemke*, 40 Kan. 142, 19 Pac. 337, is substantially similar in its facts to the case at bar. There, after judgment, defendant filed a motion on jurisdictional and non-jurisdictional grounds to set the judgment aside, and it was held that he entered a general appearance to the action.

The latest expression of this court is found in *Frazier v. Douglass*, 57 Kan. 809, 48 Pac. 36. Douglass was served with a summons, which he alleged to be void, and moved the court so to rule. Coupled with this motion was a sworn statement, in which he alleged "that he is the owner in fee, and has the valid title to the land described in the said plaintiff's petition filed in said cause, and is in the peaceable and rightful possession of the same, and that said plaintiff has no right or title thereto or to its possession; and further says that the said land is of great value, to-wit, of the value of \$3000." In the opinion in that case it is stated:

"As will be readily seen, the plaintiff [defendant] sets up matters which were non-jurisdictional and had no bearing upon the motion he had made. Where a defendant alleges and submits to the court matters that are non-jurisdictional he recognizes the general jurisdiction of the court and waives all irregularities which may have intervened in

bringing him into court. Whatever may have been the purpose of the defendant in alleging these matters, it is clear that they do not relate to the question of service or of jurisdiction. Although not entirely formal, the averments relate to the merits of the controversy, and amount to a complete answer to the allegations of the petition. When the defendant set up matters and submitted questions which were not jurisdictional, he submitted himself and his rights to the jurisdiction of the court, and he cannot be heard to say that it had no jurisdiction."

For the reasons above stated, the judgment of the district court will be affirmed.

LOUISVILLE HOME TELEPHONE CO. V. BEELER'S
ADM'X.

Court of Appeals of Kentucky. 1907.

125 Kentucky, 366.

Opinion of the Court by SPECIAL JUDGE CLAY—Reversing.

This action was instituted by Maggie Beeler, administratrix of her deceased husband, E. C. Beeler, against the Cumberland Telephone & Telegraph Company and the Louisville Home Telephone Company, to recover damages for the death of her husband, which occurred in Louisville, Jefferson county, Ky., and which is alleged to have resulted from the joint negligence of the two companies. In addition to the allegations of negligence, the petition states that decedent was a resident of Bullitt county, and that each of the defendants was a common carrier, and passed into Bullitt county. Summons was served upon the Home Telephone Company by delivering a true copy thereof to its president, and also by delivering copies to parties who were stated in the return to be agents of said company, residing in Bullitt county. * * * The defendant Louisville Home Telephone Company filed an answer in three paragraphs. In the first paragraph defendant raised the question of jurisdiction by setting forth that its residence was in Jefferson county, that it did not have any office or

agent in Bullitt county, and that it did not pass into said county. In the second and third paragraphs defendant, without waiving its objection to the jurisdiction of the court, pleaded to the merits of the case. * * *

[The Bullitt Circuit Court held that the plea to the merits was a waiver of the plea to the jurisdiction; a trial was had, and verdict and judgment were rendered against the Home Telephone Company. From an order overruling its motion for a new trial the Company appeals.]¹

At the outset there is presented for our consideration the question, did the Bullitt circuit court have jurisdiction of the appellant, Louisville Home Telephone Company? In passing upon this point, we should first discuss the question whether or not appellant entered its appearance by filing its answer both to the jurisdiction and to the merits. * * *

Among the cases relied upon by appellee is the case of *City of Covington v. Limerick*, 107 Ky. 680, 19 Ky. Law Rep. 330, 39 S. W. 836, in which the court, after holding that the circuit court undoubtedly had jurisdiction over the person of the defendant, added the following: "But, in addition to the plea of jurisdiction, the answer of the defendant goes to the merits of the controversy, and is a waiver of any objection to the jurisdiction over the person of the defendant. This is the common law doctrine, and was held to be the law in this State in the case of *Baker v. L. & N. R. R. Co.*, 4 Bush 623."

In the case of *Baker v. L. & N. R. R. Co.*, 4 Bush 623, we find, however, that the defendant first answered to the merits without suggesting any objection to the jurisdiction, and trial was then had, resulting in a verdict which was set aside and a new trial ordered. Next came a hung jury. About a year and a half thereafter the defendant attempted to plead to the jurisdiction of the court. The court very properly held that its appearance had been entered long before.

In the case of *Guenther & Bros. v. American Steel Hoop Company*, 25 Ky. Law Rep. 795, 116 Ky. 419, 76 S. W. 480, the question involved was the construction and validity of subsection 6 of section 51 of the Code, authorizing service upon the agent of a non-resident doing business in this

¹The matter inclosed in brackets has been condensed by the editor.

State. In that case the motion to quash the process was overruled. The defendant did not follow the practice adopted by appellant in the case under consideration. He did not file an answer as provided by section 118 of the Civil Code; but, along with the denial of other facts, simply put in issue the allegation of the petition that he was a non-resident of the State. Under the circumstances this court held that, having gone into the merits of the case as he did by his answer, he had entered his appearance to the action.

* * * * *

In favor of the view that a defendant who files an answer to the jurisdiction, and in the same answer, without waiving the question of jurisdiction, pleads to the merits, does not thereby enter his appearance, we find the following cases:

First, the case of *Meguiar v. Rudy*, 7 Bush 432, in which a demurrer, as in the case at bar, to the jurisdiction of the court was first filed, but overruled because the defect did not appear on the face of the petition. The defendant then filed an answer in which he first pleaded to the jurisdiction of the court, and then pleaded to the merits, including a counterclaim. The circuit court tried the case on all the issues raised and came to the conclusion that it had no jurisdiction over the person of defendant. Judgment was then entered in his favor, and, upon appeal to this court, the judgment was affirmed.

* * * * *

Now, in the case under consideration, defense could not be made by demurrer to the jurisdiction because the petition stated facts sufficient to show jurisdiction. Nor could defense be made by motion to quash the summons, because, if the court had jurisdiction at all, the summons had been served upon the proper officer, the president of the corporation. Under the circumstances, therefore, the only kind of a defense that could be made by appellant, Louisville Home Telephone Company, was by answer. This method is provided for by section 118, which is as follows: "A party may, by an answer or other proper pleading, make any of the objections mentioned in section 92, the existence of which is not shown by the pleadings of his adversary; a failure so to do is a waiver of any of said objections except that to the jurisdiction of the court of the subject of the action." An answer being the only kind of defensive

pleading that could be filed, the question arises, what sort of an answer should be filed? Should a party be required to file first an answer to the jurisdiction, and afterwards an answer to the merits, or should he have the right to file both at the same time? There is certainly no authority in the Code for filing one answer and then another answer; any answer subsequent to the original answer must be an amended answer. While in every case, no doubt, the trial court would permit an answer to the merits to be filed after an answer to the jurisdiction had been passed upon, yet the right to file an amended answer has always been held to be a matter within the sound discretion of the court. That being the case, would it not be the better practice to join all defenses in the same answer? There is certainly nothing in section 118 to the contrary. All that that section requires is that the party shall not answer to the merits without first making objection to the jurisdiction of the court. This view is not without authority to sustain it. Maxwell on Code Pleading, p. 394, speaks as follows: "At-common law pleas must be pleaded in their order; that is, dilatory pleas must be made and disposed of before a plea in bar could be determined. Under the code, however, all the defenses which a defendant may have are to be pleaded at one time, and in one answer. Therefore, matter in abatement may be joined with a plea to the merits."

* * * * *

The New York court of appeals has taken the same view. In *Sweet v. Tuttle*, 14 N. Y. 465, we have the following: "The first question is whether a defendant along with other defenses may set up in his answer the non-joinder of other parties who ought to have been sued with him. Under the former practice the non-joinder of defendants could be pleaded only in abatement, and could not be joined with a plea in bar; but, under the Code, there is no classification of answers or defenses corresponding with the distinction between pleas in abatement and in bar. The distinction is entirely gone, with the system to which it belongs. The defendant now answers but once, and he may set forth as many defenses as he thinks he has, but must state them separately * * * * *"

* * * * *

And in the case of *Little v. Harrington*, 71 Mo. 390, we

find the following: "It is evident from these statutory provisions that only one answer is contemplated, and this to contain whatever defense or defenses the defendant may have, thus dispensing with the common law rule that a plea in bar waives all dilatory pleas or pleas not going to the merits."

And the same court, in the case of *Johnson v. Detrick*, 152 Mo. 243, 53 S. W. 891, says: "A plea to the jurisdiction, even when coupled with a plea to the merits, is permissible under our Code; and the latter plea does not, as at common law, waive the former."

In view of the foregoing authorities, * * we have reached the conclusion that a defendant may in one answer plead both to the jurisdiction and to the merits. It necessarily follows that a plea to the merits that recites that the defendant does not waive his objection to the jurisdiction of the court is not a waiver of the plea of the jurisdiction. We, therefore, hold that appellant's answer did not enter its appearance to this action. * * *

* * * * *

Judgment reversed, and cause remanded for a new trial consistent with this opinion.

LINTON V. HEYE.

Supreme Court of Nebraska, 1903.

69 Nebraska, 450.

ALBERT, C. This is an action to quiet the title to several tracts of land, each plaintiff asserting title to a separate tract. * * * Service on the defendants was had by publication. They appeared specially and objected to the jurisdiction of the court over their persons, on the grounds that the affidavit for service by publication and the notice, published in pursuance thereof, were defective in certain particulars, and that such notice was not published for the period required by law. The objections were overruled, and the defendants answered.

[In their answer defendants again objected to the juris-

diction of the court, and also pleaded a counterclaim.]¹

* * * * *

* * * A trial to the court resulted in a finding and decree for the plaintiffs. The defendants prosecute error.

It is first urged that the court had no jurisdiction over the defendants. The general rule, settled by a long line of authorities, is, that if a defendant intends to rely on a want of jurisdiction over his person, he must appear, if at all, for the sole purpose of objecting to the jurisdiction of the court. If he appear for another purpose, such appearance is general, and a waiver of all defects in the original process, and an acknowledgment of the complete jurisdiction of the court in the action. *Bankers Life Ins. Co. v. Robbins*, 59 Neb. 170; *Omaha Loan & Trust Co. v. Knight*, 50 Neb. 342; *Leake v. Gallogly*, 34 Neb. 857; *South Omaha Nat. Bank v. Farmers & Merchants Nat. Bank*, 45 Neb. 29; *Dryfus v. Moline, Milburn & Stoddard Co.*, 43 Neb. 233; *Hurlburt v. Palmer*, 39 Neb. 158, 173. An exception to this rule is, that, where the lack of jurisdiction does not appear on the face of the record, the defendant may unite a plea to the jurisdiction with his other defenses to the action, without waiving his rights to insist on the lack of jurisdiction of the court. *Hurlburt v. Palmer, supra*. But, we think, such exception must be limited to cases where the plea to the jurisdiction is joined only with such defenses as go to defeat a recovery by the plaintiff, and should not be extended to cases where, as in this case, such plea is joined with a cross petition, or counter-claim, which necessitates a trial on the merits of the issues tendered by the petition. Such pleading, though denominated an answer, contains all the essential elements of a petition or complaint, and might be made the basis of an independent action and decree against the plaintiffs. It puts it beyond the lawful power of the court to dispose of the case, by a finding on the issues tendered by the plea to the jurisdiction, and compels an adjudication on the merits. The defendants, having thus compelled an adjudication on the merits, can not now be heard to question the authority of the court whose jurisdiction they thus invoked.

* * * * *

By the Court: For the reasons stated in the foregoing

¹The portion in brackets has been condensed by the editor.

opinion, the decree of the district court is affirmed.¹

¹On appeal to the Supreme Court of the United States, this case was affirmed. *Linton v. Heye*, 194 U. S. 628. The same rule was announced by the Supreme Court of the United States in *Merchants' Heat and Light Co. v. J. B. Clow & Sons*, (1906) 204 U. S. 286, where defendant filed a plea of set-off, under the Illinois practice, after saving an exception to an order overruling its special appearance, though it was conceded that a purely defensive plea would not have waived defendant's right to rely upon its objection to the jurisdiction of the court over its person.

WABASH WESTERN RAILWAY V. BROW.

Supreme Court of the United States. 1896.

164 United States, 271.

Joseph Brow commenced suit in the Circuit Court of Wayne County, Michigan, against the Wabash Western Railway to recover the sum of twenty thousand dollars for personal injuries, caused, as he alleged, by defendant's negligence, by the service, September 24, 1892, of a declaration and notice to appear and plead within twenty days, on Fred J. Hill, as agent of the company, which declaration and notice were subsequently filed in that court. On the 7th of October defendant filed its petition and bond for removal in that court, and an order accepting said bond and removing the cause to the Circuit court of the United States for the Eastern District of Michigan, and directing the transmission of a transcript of record, was entered.

* * * * *

The record having been filed in the Circuit Court of the United States for the Eastern District of Michigan, a motion to set aside the declaration and rule to plead was made in the cause in these words and figures: "And now comes the Wabash Western Railway, defendant (appearing specially for the purpose of this motion), and moves the court, upon the files and records of the court in this cause, and upon the affidavit of Fred J. Hill, filed and served with this motion, to set aside the service of the declaration and rule to plead in this cause, and to dismiss the same for want of jurisdiction of the person of the defendant in the state court from which this cause was removed, and in this

court." The affidavit was to the effect that Hill, on September 24, 1892, was the freight agent of "the Wabash Railroad Company, a corporation which owns and operates a railroad from Detroit to the Michigan state line, and was not an agent of the Wabash Western Railway, defendant in this suit;" * * * * *

* * * * *

MR. CHIEF JUSTICE FULLER, after stating the case, delivered the opinion of the court.

This was not a proceeding *in rem* or *quasi in rem*, but a personal action brought in the Circuit Court of Wayne county, Michigan, against a corporation which was neither incorporated nor did business, nor had any agent or property, within the state of Michigan; and service of declaration and rule to plead was made on an individual who was not, in any respect, an officer or agent of the corporation. The state court, therefor, acquired no jurisdiction over the person of the defendant by the service. Did the application for removal amount to such an appearance as conceded jurisdiction over the person?

We have already decided that when in a petition for removal it is expressed that the defendant appears specially and for the sole purpose of presenting the petition, the application cannot be treated as submitting the defendant to the jurisdiction of the state court for any other purpose. *Goldey v. Morning News*, 156 U. S. 518.

The question "how far a petition for removal, in general terms, without specifying and restricting the purpose of the defendant's appearance in the state court, might be considered, like a general appearance, as a waiver of any objection to the jurisdiction of the court over the person of the defendant," was not required to be determined, and was, therefor, reserved; but we think that the line of reasoning in that case and in the preceding case of *Martin v. Baltimore & Ohio Railroad*, 151 U. S. 673, compels the same conclusion on the question as presented in the case before us.

In *Goldey v. Morning News*, Mr. Justice GRAY, speaking for the court, observed: "The theory that a defendant, by filing in the state court a petition for removal into the Circuit Court of the United States, necessarily waives the right to insist that for any reason the state court had not

acquired jurisdiction of his person, is inconsistent with the terms, as well as with the spirit of the existing act of Congress regulating removals from the court of a State into the Circuit Court of the United States. The jurisdiction of the Circuit Court of the United States depends upon the acts passed by Congress pursuant to the power conferred upon it by the Constitution of the United States, and cannot be enlarged or abridged by any statute of a State. The legislature or the judiciary of a State can neither defeat the right given by a constitutional act of congress to remove a case from a court of the State into the Circuit Court of the United States, nor limit the effect of such removal * * * Although the suit must be actually pending in the state court before it can be removed, its removal into the Circuit Court of the United States does not admit that it was rightfully pending in the state court, or that the defendant could have been compelled to answer therein; but enables the defendant to avail himself, in the Circuit Court of the United States, of any and every defense, duly and seasonably reserved and pleaded, to the action 'in the same manner as if it had been originally commenced in said Circuit Court.' " 156 U. S. 523, 525.

* * * * *

Want of jurisdiction over the person is one of these defenses, and, to use the language of Judge Drummond in *Atchison v. Morris*, 11 Fed. Rep. 582, we regard it as not open to doubt that "the party has a right to the opinion of the Federal court on every question that may arise in the case, not only in relation to the pleadings and merits, but to the service of process; and it would be contrary to the manifest intent of Congress to hold that a party, who has the right to remove a cause, is foreclosed as to any question which the Federal court can be called upon, under the law, to decide."

* * * * *

Moreover the petition does not invoke the aid of the court touching relief only grantable in the exercise of jurisdiction of the person. The statute imposes the duty on the state court, on the filing of the petition and bond, "to accept such petition and bond and proceed no further in such suit," and, if the cause be removable, an order of the state court denying the application is ineffectual, for the

petitioner may, notwithstanding, file a copy of the record in the Circuit Court and that court must proceed in the cause.

* * * * *

It is conceded that if defendant had stated that it appeared specially for the purpose of making the application, that would have been sufficient; and yet when the purpose for which the applicant comes into the state court is the single purpose of removing the cause, and what he does has no relation to anything else, it is not apparent why he should be called in to repeat that this is his sole purpose; and when removal is had before any step is taken in the case, as the statute provides that "the cause shall then proceed in the same manner as if it had been originally commenced in said Circuit Court," it seems to us that it cannot be successfully denied that every question is open for determination in the Circuit Court, as we have, indeed, already decided.

* * * * *

We are of opinion that the filing of a petition for removal does not amount to a general appearance, but to a special appearance only.

* * * * *

MR. JUSTICE BREWER and MR. JUSTICE PECKHAM dissented.

FISHER, SONS & COMPANY V. CROWLEY.

Supreme Court of Appeals of West Virginia. 1906.

57 West Virginia, 312.

[Action of assumpsit. The defendants moved to quash the summons. After the motion was overruled a plea of *non-assumpsit* was tendered. Judgment for the plaintiffs. Defendants assign error.]¹

POFFENBARGER, J. * * * It has been suggested that, by tendering the plea of *non-assumpsit* after the motion to quash had been overruled and making other defenses, the defendants submitted themselves to the jurisdiction of the

¹The matter in brackets has been condensed by the editor.

court, waiving the defect in the writ. * * * No decision of this court holds that there is a waiver of a defect in a summons by proceeding to trial after an adverse ruling on a motion to quash and an exception taken thereto. *Sears v. Starbird*, 78 Cal. 225, and *Desmond v. Superior Court*, 59 Cal. 274, so hold, but they are not in accord with the more carefully considered cases of *Lyman v. Milton*, 44 Cal. 630, and *Deidesheimer v. Brown*, 8 Cal. 339, neither of which is noticed in the opinion in the two subsequent inconsistent cases. *Desmond v. Superior Court* went up from a justice court and *Sears v. Starbird* simply adopted the rule without comment. In view of this, it may be fairly said they are not well considered cases. In Michigan, Indiana, Colorado, Nebraska, Florida and Missouri, it has been held that defective service is waived by going to trial, 2 Ency. Pl. & Pr. 631 and cases cited, but the authority for the decisions, in some instances, is found in peculiar statutes, and most of the cases originated in justice's courts where practically all formalities are dispensed with.

Against this doctrine of waiver in cases of defective service stand the decisions of many states and the high authority of the Supreme Court of the United States. *Harkness v. Hyde*, 98 U. S. 476, holds that "Illegality in the service of process by which jurisdiction is to be obtained is not waived by the special appearance of the defendant to move that the service be set aside; nor after such motion is denied, by his answering to the merits. Such illegality is considered as waived only when he, without having insisted upon it, pleads in the first instance to the merits." *Mullen v. Railroad Co.*, (N. C.) 19 S. E. 106, says: "Where a motion made on special appearance to dismiss for want of service of summons is overruled, and defendant excepts, his subsequent appearance to the merits, waives none of his rights." *Ames v. Windsor*, 19 Pick (Mass.) 247, says: "So, where the defendant, upon the entry of the action in the court of common pleas, moved that court to dismiss it, on the ground that the writ was not duly served, and this motion was overruled, and the defendant thereupon joined in the common demurrer, and the action was thereupon entered in this court, it was held, that the defendant had not thereby waived his exception to the legality of the service." To

the same effect are *State v. Dupre*, 46 La. Ann. 117, and *Railroad Co. v. Heath*, 87 Ky. 651. Authorities of greater dignity in this court, however, are its own decisions in *Chapman v. Maitland*, 22 W. Va. 329, (Syl. pt. 3), *Price v. Pinnell*, 4 W. Va. 296, and *Steele v. Harkness*, 9 W. Va. 13.

* * *

That pleading to the merits, without previous objection to the process or return, is a waiver of process, defects in process, defects in return, defective service and total want of service is in no sense denied. The proposition is asserted by a vast array of authorities. See 2 Ency. Pl. & Pr. 646. It is ancient law in this state. *Tuberville v. Long*, 3 H. & M. 309; *Winston v. Overseers*, 4 Call. 357; *Harvey v. Skipwith*, 16 Grat. 410; *Mahany v. Kephart*, 15 W. Va. 619; *Todd & Smith v. Gates*, 20 W. Va. 604; *Bank v. Bank*, 3 W. Va. 386. But the principle, as sound in law as it is in reason and justice, that the appearance, to have such effect, must be voluntary, has never been departed from except in the single case of *Railway Co. v. Wright*, 50 W. Va. 653, and that, as has been shown, compelled only a waiver of service, a matter of less consequence than the requisites of a valid summons. A man may waive perfect defenses to any demand, however large, though without a shadow of merit, by a mere failure to appear and defend, but, by any law or decision which would prevent his appearance or cut off his opportunity to make defense, he would be more effectually robbed of his money than if it were taken from him by a highwayman. It must be voluntary and free from constraint, else it is not binding. Nor can he be deprived of any other legal right except by his own voluntary act. He has a perfect right to remain out of court until regularly and legally brought in, and, if an attempt is made to bring him in irregularly, he has a perfect right to object, on the ground of irregularity, in proper time, and manner. To force him to waive it, by saying, if he does not do so, he can make no defense on the merits, is a palpable denial of a legal right. He must then determine whether he will risk his whole case on the question of insufficiency of the writ or return, as the case may be, however full and complete he might be able to make his defense on the merits, or waive the defect and submit himself to a jurisdiction not lawfully obtained, in order to prevent his being forever

deprived of his defense in case his objection to the writ or return should prove to be not tenable. A test of the courts jurisdiction could never be made except at great peril, a result of which would be that no attempt to do so would ever be made in a case in which defense on the merits could be made. In order to do so it would be necessary to suffer a judgment by default, then go back to the same court with a motion to set it aside for insufficiency of process, vainly ask the court to reverse itself, suffer the same adverse ruling, and then, if possible, obtain a writ of error from this Court and reverse the judgment for the defect in process alone, and, on failure of that, to be forever barred of any defense on the merits. For the court to present to a party the alternative of waiving a jurisdictional defect or giving up his defense, and compel him to choose, is not to allow a voluntary submission to its jurisdiction, but to coerce such submission or a relinquishment of the defense on the merits, however ample and just it may be, and give to the plaintiff what he is clearly not entitled to—the appearance of the defendant without process or relinquishment of defense in that action. How can the action of a court, in arbitrarily taking from one man a right, trivial and unimportant though it be, and conferring it upon another, be justified, either legally or morally? Is the right to stay out of court until legally brought in worth nothing? Is process a mere idle formality? If so, why allow a default judgment to be set aside for want of it? That this will be done all admit, and, in admitting, confess that the acquisition of jurisdiction by process is a matter of substance and not of form. To say in the same breath that a man may not test it without surrendering his defense to the merits is squarely and flatly inconsistent, contradictory of the admitted nature of the right, and violative of law in that it forcibly deprives the citizen of a substantial legal right. To say that the office of process is to bring the defendant into court and that, after his appearance, it is wholly unimportant and may be disregarded, falls far short of justifying the ruling. His appearance is involuntary. He must come or risk everything on the question of insufficiency of the process. If he does not, a judgment by default goes against him, forever precluding any defense, be it a release, payment, fraud or what not, unless he can have it set aside for the defect in

the process or some other error. It puts him under compulsion from the moment of service. The court has laid its powerful hand upon him and will render judgment against him without a hearing if he does not bring to its attention the defect in its process and ask to be discharged. For the court to say, upon such compulsory appearance and protest against jurisdiction, now that you are here, you must stay, no matter how you were dragged in, is but bitter mockery, utterly inconsistent with the principles of the law, eulogized in these days of enlightenment for their justice and fairness even in those periods in which society was comparatively crude and barbarous.

* * * * *

To test the sufficiency of the summons, the appearance must be special, of course, but it is not necessary in a court of record to make the order, plea or motion expressly state that the appearance is only for the purpose of excepting to the jurisdiction. * * * *Groves v. County Court*, 42 W. Va. 587, seems to impliedly hold that if the record show that a defendant came into court without saying he came for a special purpose, his appearance is presumed and taken to have been a general appearance, but the record showed that the case, commenced by notice, had been docketed and the cause removed to another court, on motion, after appearance, and before any exception to the notice was taken. Hence the record showed more than mere presence in court. Here the record as a whole negatives any intent to voluntarily submit to the jurisdiction. An immediate and direct attack was made upon the writ, and an exception to the action of the court in refusing to quash it put upon the record. However it may be when the objection is insufficiency of service, and defectiveness of the summons in a justice's court, the uniform holding by this court has been that where the writ commencing an action in a court of record is excepted to before any plea has been tendered or continuance had, or other step taken, importing a general appearance, the defendant is deemed not to have waived or lost the benefit of his motion, if an exception was taken and saved, although he afterward plead to the merits and went to trial.

* * * * *

For the foregoing reasons, the judgment must be re-

versed, the summons quashed and the action dismissed, with costs both in this court and the court below.

Reversed.

SANDERS, JUDGE, dissented in part.

CORBETT V. PHYSICIANS' CASUALTY ASSOCIATION.

Supreme Court of Wisconsin. 1908.

135 Wisconsin, 505.

Action to recover on an accident insurance policy issued on the mutual assessment plan. * * * The answer stated three defenses, as follows, in effect: (1) The defendant is a Nebraska corporation which has never complied with the laws of this state authorizing service of process upon it by serving upon the commissioner of insurance and the only service made was of that character; (2) without waiving the plea to the jurisdiction of the court the defendant shows that it never qualified to do business in this state and, therefore, the making of the insurance contract was prohibited by sec. 1978, Stats. (1898), and is not enforceable in the courts of this state; (3) without waiving any right under the foregoing, the allegations of the complaint as to the assured being a member in good standing of the association at the time he was injured are denied. * * *

The plea to the jurisdiction was tried first and overruled. Defendant by its counsel excepted to the ruling. No specific objection was made to then proceeding to a trial upon the merits, which was done. * * *

Judgment was rendered in favor of the plaintiff, from which this appeal was taken.

MARSHALL, J. At the threshold in the consideration of this case is presented the question of whether a defendant can challenge the jurisdiction of the court in which he is cited to appear, upon the ground that the summons in the action was not efficiently served, and failing in that can submit to a trial upon the merits and in case of an adverse

decision can, on appeal, have the benefit of the objection made at the start. * * *

As we view the case we need not follow and endeavor to answer counsel's argument in detail on the jurisdictional question, because it is firmly settled in respondent's favor by numerous decisions of this court. *Lowe v. Stringham*, 14 Wis. 222; *Grantier v. Rosecrance*, 27 Wis 488; *Blackwood v. Jones*, 27 Wis. 498; *Anderson v. Coburn*, 27 Wis. 558; *Ins. Co. of N. A. v. Swineford*, 28 Wis. 257; *Alderson v. White*, 32 Wis. 308; *Dikeman v. Struck*, 76 Wis. 332, 45 N. W. 118. The following language by Dixon, C. J., in *Alderson v. White*, *supra*, referred to by counsel for respondent, is often quoted as an unmistakable indication of the doctrine prevailing in this state:

"The party seeking to take advantage of want of jurisdiction in every such case, must object on that ground alone, and keep out of court for every other purpose. If he goes in for any purpose incompatible with the supposition that the court has no power or jurisdiction on account of defective service of process upon him, he goes in and submits for all the purposes of personal jurisdiction with respect to himself, and cannot afterwards be heard to make the objection. It is a general appearance on his part. equivalent in its effect to proof of due personal service of process."

It will be thus seen that the right to proceed to a trial on the merits after a decision against the defendant on the jurisdictional question, efficiently saving an objection to the ruling in that regard, is not recognized as having any place in our practice. The quoted language was only a reiteration, in effect, of what was said in *Lowe v. Stringham*, *supra*. There the doctrine which has from the start prevailed here, was thus plainly stated in these words:

"We think it is also a waiver of such a defect for the party, after making his objection, to plead and go to trial on the merits. To allow him to do this, would be to give him this advantage. After objecting that he was not properly in court, he could go in, take his chance of a trial on the merits, and if it resulted in his favor, insist upon the judgment as good for his benefit, but if it resulted against him, he could set it all aside upon the ground that he had never been properly got into court at all. If a party

wishes to insist upon the objection that he is not in court, he must keep out for all purposes except to make that objection."

We recognize that there are very respectable authorities to the contrary of the foregoing, among which are the following: *Harkness v. Hyde*, 98 U. S. 476; *Miner v. Francis*, 3 N. D. 549, 58 N. W. 343; 2 Ency. Pl. & Pr. 629, 630, and note 1. However, it is believed that the great weight of authority, or at least the better reasoning, is the other way. These are but a few of the many cases that might be cited in support of that: *In re Clarke*, 125 Cal. 388, 392, 58 Pac. 22; *Manhard v. Schott*, 37 Mich. 234; *Stevens v. Harris*, 99 Mich. 230, 58 N. W. 230; *Union Pac. R. Co. v. De Busk*, 12 Colo. 294, 20 Pac. 752; *Lord v. Hendrie & B. Mfg. Co.*, 13 Colo. 393, 22 Pac. 782; *Ruby Chief M. & M. Co. v. Gurley*, 17 Colo. 199, 29 Pac. 668; *Stephens v. Bradley*, 24 Fla. 201, 3 South. 415; *Thayer v. Dove*, 8 Blackf. 567; *Kronski v. Mo. Pac. R. Co.*, 77 Mo. 362.

* * * * *

By the Court—The judgment is affirmed.

SECTION 4. WITHDRAWAL OF APPEARANCE.

ELDRED V. BANK.

Supreme Court of the United States. 1873.

17 Wallace, 545.

Error to the Circuit Court for the Eastern District of Wisconsin.

* * * The Michigan Insurance Bank, on the 14th of August, 1861, sued Anson Eldred, Elisha Eldred, and Uri Balcom, trading as Eldreds & Balcom, in the court of Wayne County, Michigan, as indorsers on a promissory note for \$4,000. * * * Publication-notice under the laws of Michigan was given. * * * The defendant, *Anson Eldred*, filed a plea of non-assumpsit, with notice of set-off, December 27th, 1861, and demanded a trial.

On the 22nd of April, 1862, as the record of the case

stated, the cause came on to be heard, and the plea of the defendants theretofore pleaded by them was withdrawn, and the default of *Elisha Eldred* and *Uri Balcom* entered, and on the 10th day of May the said default was made absolute. On the 13th of May, the record continues:

“The plea of the defendant, *Anson Eldred*, heretofore pleaded by him, having been withdrawn, and the default of the defendants, *Elisha Eldred* and *Uri Balcom*, having been duly entered, * * * therefor, it is considered that said plaintiffs do recover against said defendants their damages aforesaid, together with their costs aforesaid to be taxed, and that said plaintiff have execution therefor.”

In this state of things the bank brought this, the present suit, in the court below, on the same note against the same *Anson Eldred*, *Elisha Eldred*, and *Uri Balcom*. * * * *Anson Eldred*, who alone was served or appeared, pleaded the general issue; and the case came on for trial. * * * The defendant * * * then offered in evidence the record of the above mentioned suit on the same note in the *Wayne County Court*:

1st. * * *

2nd. As being a *bar* to recovery on this note in suit.

* * * * *

Judgment having gone accordingly for the bank, *Anson Eldred* brought the case here on error; the error assigned being the refusal of the court to instruct the jury that the judgment was a *bar*.

* * * * *

Mr. JUSTICE MILLER delivered the opinion of the court.

It is argued by the counsel of the defendant in error that the withdrawal of the plea of *Anson Eldred* left the case as to him as though he had never filed the plea, and that never having been served with process he was not liable to the personal judgment of the court.

We do not agree to this proposition. The filing of the plea was both an appearance and a defense. The case stood for the time between one term and another with an appearance and a plea. The withdrawal of the plea could not have the effect of withdrawing the appearance of the defendant, and requiring the plaintiff to take steps to bring that defendant again within the jurisdiction of the court. Having withdrawn that plea he was in a condition to de-

mur, to move to dismiss the suit if any reason for that could be found, or to file a new and different plea if he chose, either with the other defendants jointly, or for himself. He was not, by the withdrawal of the plea, out of court. Such a doctrine would be very mischievous in cases where, as it is very often, the first and only evidence of the appearance of a party is the filing of his plea, answer, or demurrer. The case might rest on this for a long period before it was ready for trial, when, if the party could obtain leave of the court to withdraw his plea (a leave generally granted without objection), he could thereby withdraw his appearance, the plaintiff is left to begin *de novo*.

We are of opinion that the record of the suit in Michigan shows a valid personal judgment against Anson Eldred, and that that judgment was a bar to recovery in the present suit.

* * * * *

Judgment reversed, but without costs to either party in this court, and a new trial granted in the Circuit Court.

INSURANCE TRUST AND AGENCY V. FAILING.

Supreme Court of Kansas. 1903.

66 Kansas, 336.

The opinion of the court was delivered by JOHNSTON, C. J.: * * * * *

On April 3, 1900, the defendants appeared by their attorney and filed separate demurrers, in each of which the following grounds were stated:

"1. That the court had no jurisdiction of the person of the defendant or the subject of this action.

"2. That there is a defect of parties defendant.

"3. That several causes of action are improperly joined and

"4. That the petition does not state facts sufficient to constitute a cause of action."

On June 29, 1900, the defendants, without notice to the

plaintiff, orally asked and obtained leave to withdraw the demurrers and appearances previously filed. * * *

* * * Was jurisdiction lost by the attempted withdrawal of the demurrers and appearances several months afterward? We think not. The code (§67; Gen. Stat. 1901, §4497) declares that "the voluntary appearance of a defendant is equivalent to service." Will it be contended that a defendant served with summons, who has tired of the litigation, can withdraw from the case and the jurisdiction of the court at will? Where a defendant pleads and makes a general appearance, he waives the service of summons and any defect that there may be in the process, and is in court as fully and effectually as though personal service had been made on him. A submission to the jurisdiction of the court, whether coerced by process or voluntary as in this case, cannot be retracted or withdrawn to the prejudice of the plaintiff. To allow a withdrawal which would divest the court of jurisdiction obtained by a general appearance would be a great injustice to a plaintiff who had relied on the appearance of a non-resident defendant until the time and opportunities to obtain service otherwise had passed. The court may permit a withdrawal, or rather set aside an appearance made without authority, or procured by fraud, but under a code provision making a general appearance co-equal with service, the court has no more right to permit a withdrawal of such appearance conferring jurisdiction, than it would have to set aside service of a summons regularly made. Here there was no claim of fraud, or of misapprehension, as the appearance was made by counsel who was shown to have full authority to represent the defendants. The action of the court in permitting a withdrawal of appearance was unwarranted.

* * * * *

Reversed.

SECTION 5. AUTHORITY OF ATTORNEY TO APPEAR.

HAMILTON V. WRIGHT.

*Court of Appeals of New York. 1868.**37 New York, 502.*

This was an action of ejectment, brought in the name of the appellants [Hamilton and Livingston] and one Gleason, to recover possession of certain lands in the town of Shandaken, Ulster county. * * * Judgment in favor of the defendant for his costs, was rendered against all of the plaintiffs, and was affirmed on appeal to the General Term.

Hamilton and Livingston moved at the Poughkeepsie Special Term that the judgment against them be vacated, or, in case Gleason failed to pay the costs, that William Lounsbury, plaintiffs' attorney, should pay the judgment, upon the ground that the use of their names as plaintiffs was unauthorized and unknown to them. The special Term denied the motion with costs. From this order denying the motion, Hamilton and Livingston appealed to the General Term, where the order was modified, directing that the judgment be in the first instance collected, if collectible, of W. S. Gleason, their co-plaintiff, who caused the action to be brought, and that the question of the liability of plaintiffs' attorney to Hamilton and Livingston, in case they are to pay the judgment, be left open: neither of the parties to have costs, as against the other, upon such appeal. From this last order, Hamilton and Livingston appealed to this court.

WOODRUFF, J. The general rule, that an appearance by attorney, whether for the plaintiff or the defendant, if there be no collusion, may be recognized by the adverse party as authentic and valid, I deem important to the safe administration of justice, and well founded in the scheme and plan of such administration in England and this country ever since such officers were commissioned to represent litigants in the courts.

Receiving their authority from the court, they are deemed its officers. Their commissions declare them entitled to confidence, and, in a just sense, their license is an assur-

ance, not only of their competency, but of their character and title to confidence.

The direct control of the courts over them as officers, by way of summary discipline and punishment to compel the performance of their duty, or to suspend or degrade them, is retained and exercised as a guaranty of their fidelity. It is no denial of the rule that, where there are special circumstances calling for its relaxation, the courts may and do relieve from its rigid application. The exception arising from such special circumstances strengthens, as well as recognizes the rule itself.

Hence, when an appearance is entered by an attorney without authority, the inquiry, whether such attorney is of sufficient responsibility to answer for his unauthorized conduct to the party injured thereby, is entertained. And it may be proper always to inquire, whether the injury to the party is irremediable unless such appearance be set aside, and the proceedings founded thereon vacated.

In exercise of their general equitable control over their own judgments, the court may and should consider whether they can relieve the party for whom an unauthorized appearance is made, without undue prejudice to the party, who has in good faith relied upon such appearance and the official character of the attorney who appears.

But it would be at variance with the scheme and plan upon which we universally administer the law, if a defendant could be prosecuted by a responsible attorney, in full authority to practice in our courts, and after having successfully and in good faith defended, as the case might be, through all the tribunals of justice, and to final judgment in the court of last resort, be required to submit to an order setting aside the proceedings, and be left to be again prosecuted for the same cause of action, on the mere ground that the plaintiff's attorney had no authority from the plaintiff to bring the action. The law which gives to attorneys their commissions, must be deemed to guarantee to defendants protection against such a result. And, at the same time, the rule should yield to equitable considerations, where they arise, and should permit the courts to give relief when they can thereby prevent irremediable wrong to either party.

And if it be asked, why should the party for whom he

appears be left to seek his remedy against the attorney?— why should not the party who has been subjected to an unauthorized litigation pursue that remedy, rather than cast that hazard and burden on one who has done nothing to deserve it?— the answer lies in the suggestion already made, that the law warrants a party in giving faith and confidence to one who, by law, is authorized to hold himself out as a public officer, clothed with power to represent others in the courts. And besides this, the consequences of the contrary rule would often be altogether disastrous. Evidence would be lost; witnesses die; the statute of limitations bar claims; and death of parties themselves might often happen. In various ways, to set aside proceedings at the end of a protracted litigation would be to work inevitable wrong to the party who had relied upon an appearance.

It may be said that proof of the authority of the attorney to appear and prosecute should be demanded, if the party would be safe. If such demand could in all cases be insisted upon, it would be only one step toward safety. It might often be practically ineffectual. *Ex parte* evidence of authority might be produced, and yet, if the party might afterward impeach it, the question would again arise, in all its force. Besides, it is not the practice to require attorneys to produce their authority, except in special cases. No doubt there is power in the courts to order it: it has sometimes been done. (*Ninety-nine Plaintiffs v. Vanderbilt*, 4 Duer, 632.)

When, pending a litigation, the authority of the attorney to appear is denied, and application is made in due season, the court, if probable cause appears, would, in general, protect the party applying. Still, the general rule remains, that a retainer will be presumed; and the adverse party, having no notice or ground of suspicion, may act on that presumption. (3 Merivale, 12; 2 Mylne & Keen, 1; 1 Ves. 196; 6 Johns. 297; 9 Paige, 496.) And in general where there are no circumstances of suspicion, of facts indicating fraud, and no evidence of bad character discrediting the appearance, the courts do not require a respectable and responsible attorney to exhibit his authority to appear. (6 Johns. 34; 5 Duer, 643.)

It is, however, suggested, that, as in ejectment, the

defendant is authorized by statute to require the attorney for the plaintiff to produce his authority (2 R. S. 306), this action should be deemed an exception to the general rule, and it be held that the defendant's own *laches* have caused his misfortune, if it afterward appear that the plaintiff did not authorize the suit. But it is obvious that the statute itself does not furnish complete protection. It only makes the production of apparent written authority, sustained by affidavit, presumptive evidence. And if the authority do not actually exist, the same question will arise in ejectment as in other actions: How far is the plaintiff bound by the appearance of an attorney for him? And, as respects an appearance for a defendant, the statute makes no provision.

I do not think, therefore, that the omission of the defendant to demand the production of authority, where he has nothing to put him on his guard, awaken his suspicion, or to lead him to distrust the good faith of the attorney who prosecutes the action, should affect his right to insist upon his judgment, when it is not claimed that the attorney is not of full and sufficient responsibility to answer to the plaintiff for any costs or other damage he may have sustained.

* * * * *

Judgment affirmed.

DANVILLE, HAZLETON AND WILKES-BARRE
RAILROAD COMPANY, APPELLANT, V. RHODES.

Supreme Court of Pennsylvania. 1897.

180 Pennsylvania State, 157.

Appeal by plaintiff from order striking off warrant of attorney.

David C. Harrington, for appellant.

George L. Crawford, for appellee.

Opinion of Mr. Justice WILLIAMS:—On the seventh day of June, 1892, D. C. Harrington, Esq., an attorney at law regularly admitted to practice in the courts of Philadelphia

filed the bill in equity in this case as the attorney of the plaintiff.

On the eighteenth day of the same month a rule was entered in the minutes by the prothonotary, on the direction of Crawford & Laughlin, attorneys for Rhodes et al. and the D. H. and W. Railroad Co., requiring D. C. Harrington to file his warrant of attorney. No affidavit or statement of facts tending to throw doubt upon his authority was filed and no application whatever was made to the court of which Harrington was a sworn officer. On the twenty-fifth of the same month Harrington filed a warrant of attorney in due form executed by the corporation under its seal. This was a compliance with the rule and it should regularly have been discharged. The court however without any formal disposition of the warrant of attorney, and without even a suggestion on the record that it was not what it purported to be, granted a rule on Harrington to show cause why the warrant should not be struck from the records. This rule it subsequently made absolute and the warrant was struck off. For what reason this rule was granted, or for what reason it was made absolute, it is impossible to tell so far as the records in this case are concerned. Having thus disposed of the attorney of the plaintiff, a rule was at once granted requiring the plaintiff to show cause why the bill should not be struck from the records. This was soon after made absolute. The cause was sent out of court, after the attorney, in a novel and peremptory manner. The record shows no reason whatever, given by Messrs. Crawford & Laughlin, for asking either of these rules, and none given by the court below for making them absolute. We know of no authority for such a practice. It is elementary law that an attorney is an officer of the court in which he is admitted to practice. His admission and license to practice raise a presumption *prima facie* in favor of his right to appear for any person whom he undertakes to represent. When his authority to do so is questioned or denied the burden of overcoming this presumption in his favor rests on him who questions or denies his authority, and such person must show by affidavit the existence of facts tending to overcome the presumption before he can be called upon to file his warrant of attorney: Weeks on Attorneys at Law, 387 to 400.

The established practice in this country and England is to apply to the court by petition stating the facts relied on to overcome the presumption and asking a rule upon the attorney to file his warrant. When he has complied with the rule by filing a warrant sufficient in form and in the manner of its execution, the rule has been complied with and is *functus officio*. If the warrant is alleged to be defective, or forged, or in any manner insufficient to justify the court in treating it as authority for the appearance of the attorney, the defect should be pointed out by exceptions and its sufficiency passed upon by the court. If the court holds the warrant sufficient the case proceeds. If it is held insufficient proceedings therein will be stayed or in a proper case the suit may be dismissed. In *Campbell v. Galbreath*, 5 Watts, 423, Justice Kennedy discusses the practice to some extent and says at page 430, that after it is ascertained that the attorney for the plaintiff has no authority to appear for him in the suit pending, the defendant may proceed to have it dismissed. The same practice prevails in the United States courts and in those of most of the states. * * *

* * *

[Order affirmed on other grounds.]

CHAPTER IV. CONTINUANCE.

SECTION 1. SURPRISE AT THE TRIAL.

PITTSBURGH, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY V. GROM.

Court of Appeals of Kentucky. 1911.

142 Kentucky, 51.

Opinion of the Court by WM. ROGERS CLAY, Commissioner—Affirming.

Appellee, William Grom, brought this action against the appellants, Pittsburg, Cincinnati, Chicago & St. Louis Railway Company and Pennsylvania Railroad Company, to recover damages in the sum of \$1,999 for personal injuries, alleged to have been due to the negligence of the railroad companies while he was a passenger on their lines of railroad. The jury awarded him a verdict for the full amount sued for, and the defendants have appealed.

The facts, briefly stated, are as follows: Appellee bought a ticket from Louisville to Atlantic City and return. The accident occurred between Pittsburg and Altoona, in the State of Pennsylvania. At the time of the accident appellee was sitting in the middle of the sixth seat from the front end of the car. He was struck by some hard and heavy substance over the left eye. The frontal bone was fractured and his eye so seriously injured that the sight thereof is permanently impaired. At the time of the accident a freight train was passing. Just before and after the injury, witnesses heard something rattling against the side of the car. It sounded like a chain. Indentations were found on the side of the car which looked as if they had been made by an irregular object in the form of a chain. One of the witnesses saw the passing shadow of the object that struck appellee, and it looked like a chain. Immediately after the injury several persons searched the car, and nothing was found therein which could have caused the

injury. Appellant's testimony was to the effect that on the freight trains ordinarily used there are no chains in a position to be swung out so as to strike or enter a train on an adjacent track, and, even if there were such, they would hang by the side of the car by reason of their own weight, and would not swing out from the car by reason of the velocity of the train. The witnesses, however, had no knowledge of the condition of the particular train in question and they admit, on cross-examination, that there were numerous chains in and about freight cars.

* * * * *

At the conclusion of the evidence for appellee, appellants' senior counsel filed his affidavit and moved for a continuance on the ground of surprise. In this affidavit counsel stated, in substance, that he had had sole charge of the defense of the action that was being tried; that therefore he had made a most thorough investigation of the facts of the case and had had submitted to him full reports made by the agents of appellants as to all facts connected with the injury. He had never heard until the day before the trial that any attempt would be made to show that appellee was struck by a chain, when he was then informed in a general way by appellee's counsel that he would show that fact. In all the investigations made and in the reports submitted to him, it had never been suggested that the accident could have happened in that way. He was, therefore, taken completely by surprise, as were the appellants, by the evidence introduced by appellee, and he was not then prepared to rebut such evidence. He had taken the deposition of the train conductor, but did not ask him about a chain, because he had never heard it suggested or thought it possible that a chain could have anything to do with the accident. If allowed an opportunity to do so he could and would procure testimony of witnesses—all residing in the state of Pennsylvania—which would prove (1) that there were no marks on the car on which appellee was injured indicating that it had recently been struck by anything; (2) that all the persons who were in the coach and near appellee were asked by the conductor and brakeman as to the cause of the accident, and none of them could give any explanation of it, and none of them said anything about hearing a chain or seeing a chain, and none

of them suggested that a chain had anything to do with the accident; (3) that at the time there were no chains upon or attached to appellants' engine or cars, or forming any part of the equipment thereof that were long enough to reach into the window of a passenger coach on an adjacent track and strike a passenger, as appellee was struck; (4) that all chains connected with such equipment were, however, short chains, and in the event of their breaking they would drag on the ground, and could not swing out in a horizontal position so as to come in contact with a train on an adjacent track; that such a thing is a physical impossibility; (5) that "shortly after the accident to plaintiff the conductor caused telegraphic notice to be given of it and instructions were immediately given to inspect all west-bound freight trains that had met plaintiff's train to see if anything was attached to or projected from them that could have caused the accident, and such investigation was made and nothing found to explain the cause of the accident;" that these facts could be established by the testimony of several witnesses (naming them) and could not be established by any witnesses living in the State of Kentucky. Did not anticipate, nor did the railroad companies anticipate, and no one could have reasonably anticipated, that appellee would attempt to prove that his injuries were caused in such an unusual or unheard-of manner as being struck by a chain. If the railroad companies had known in time that such proof would be offered, they could and would have met it by showing facts to the contrary.

The foregoing affidavit was not filed until appellants' motion for a peremptory instruction, at the conclusion of appellee's evidence, had been overruled. Before asking for a continuance on the ground of surprise, therefore, counsel for appellants first took the chance of appellee's failing to make out his case. Though apprised of the fact in a general way on the day before the trial that appellee would attempt to show that he was struck by a chain, he did not ask for a continuance of the case when it was called for trial. At the time of the trial the law of Pennsylvania was in proof. Counsel knew that under that law upon mere proof of injury, unaccompanied by any facts tending to show a collision or a defect of cars, track, roadway, machinery or other negligence appellee could not recover.

The deposition of the conductor showed that there was absolutely nothing the matter with the train on which appellee was a passenger. A search was made to find whether or not the object which had struck appellee was in the car, and nothing was found. Knowing the law of Pennsylvania, counsel should have anticipated that appellee would attempt to prove facts tending to show negligence in the operation or mechanical appliances of the passing train, as appellee could not recover by merely showing that he was injured by some object, without showing the source from which it came. Furthermore, counsel admits in his affidavit that immediately after the accident, the conductor caused telegraphic notice of the fact to be given, and instructions were immediately sent out to inspect all west-bound freight trains that had met the train on which appellee was a passenger, to see if anything was attached to, or projected from them that could have caused the accident and such investigation was made and nothing found to explain the cause of the accident. This being true, counsel should have taken the depositions of witnesses acquainted with such facts, and should not have gone into the trial in the hope that appellee would fail to make out his case, and, in the event that he did make out his case, appellants would be granted a continuance and a further opportunity to prove facts which they could have established before the trial. We, therefore conclude that the court did not err in failing to grant the continuance asked for.

* * * * *

Judgment affirmed.

PETERSON V. METROPOLITAN STREET RAILWAY
COMPANY.

Supreme Court of Missouri. 1908.

211 Missouri, 498.

LAMM, J.—Peter L. Peterson sued for damages—his cause of action the negligence of defendant's servants manning one of its street cars in Kansas City, Missouri, on the

13th day of December, 1902. Defendant appeals from a judgment in favor of Peterson for \$5,000. Here, his death was suggested and proceedings had reviving the the cause in the name of Henrietta, administratrix of his estate.

* * * * *

Did the court err in allowing amendments; and err again in refusing a continuance? We think not; because;

(a) The statutory right to amend a petition is not open to discussion. The right of a court to permit a petition to be amended is nothing more than plain, everyday, hard-headed sense. The right to act with good sense may (modestly) be assumed to be inherent in any court, and (it is likely) would exist without written law. Counsel make the point that plaintiff had no right to amend the petition at the trial, but they give no reason or cite no authority. All things, says Coke, are confirmed or impugned in one of two ways—by reason or authority. The point should not have been made; for the only possible question is one of *terms* on which the amendment may go and that question is not raised.

(b) The principal proposition under this head is the refusal to grant a continuance after amendment. It is argued that prior to the amendments the petition stated no cause of action because there was no averment that the car had stopped to receive passengers who might undertake to get on; that the amendments supplied that omission; that after amendment the petition for the first time stated a cause of action; and that amendments of that character, made at the commencement of a trial, entitling the defendant to a continuance as of course, much more should one go in view of the application and affidavit filed in this instance.

But we can agree neither to the premise, nor to the conclusion if the premise were true. The petition did state a cause of action. It alleged that defendant's Main street cars regularly stopped about ten feet north of Twelfth for the purpose of permitting passengers to get on and off. That plaintiff on the 13th day of December, 1902, attempted to enter defendant's car at *said point* to take passage and that, while in the act of doing so with his foot upon the step at the back end of the car, defendant's servants care-

lessly and negligently *started said car forward with a violent jerk.*

The allegation that the car "*started*" was by necessary implication an allegation that the car was stationary at the time. A thing can't start without a *stop*. The one includes the other, *ex vi termini*. We had occasion to discuss a similar contention in *Flaherty v. Railroad*, 207 Mo. 1 c. 335, where it was said: "But in ordinary speech, if A says B '*moved forward*,' there is a fair implication, at least, that A means that B was in a condition of repose when the movement began. If A was bent on expressing the idea that B was going at the time, but then and there began to hasten his pace, he would naturally have inserted some word to convey the accelerated motion. The absence of such modifying word, here, is not without significance."

What was said in the Flaherty case, though in discussing an instruction, applies here. If the petition had said that the car started forward "*more rapidly*" that would convey the idea it was *moving* at the time, but there is no such word used and the petition is only subject to the criticism that it defectively or obscurely stated a cause of action—not that it stated none whatever. It would have been good after verdict.

But, if it were conceded that the petition stated no cause of action before amendment, defendant would not be entitled to a continuance, as of course, on that ground. The canonized rule is, and all the cases hold, that a continuance is addressed to the sound discretion of the trial court—a discretion to be soundly exercised. It is trite law that every intendment exists in favor of the trial court's action on an application for a continuance. The statute under which these particular amendments were allowed is Revised Statutes 1899, section 688, reading: "When a party shall amend any pleading or proceeding, and the court shall be satisfied, by affidavit or otherwise, that the opposite party could not be ready for trial in consequence thereof, a continuance may be granted to some day of the same term, or at the next regular term of the court."

It will be seen from that statute that an affidavit is not essential. The court may be satisfied "*by affidavit or otherwise*" that the opposite party could not be ready for trial in consequence of the amendment.

There was no attempt, except by the affidavit, to satisfy the court that the defendant could not be ready for trial; attending to that affidavit, it does not show defendant had not subpoenaed witnesses on the issues made by the amendments. Subsequent events showed it had—and all it knew of. It does not state that the allegations, as amended, are not true, or that it had a meritorious defense to the new matter, nor does it point out that defendant could be ready to meet those allegations at any other time. Hence, we find no fault with the court's ruling on the application. It is fully sustained by the following cases cited by counsel construing section 688, *supra*: *Colhoun v. Crawford*, 50 Mo. 458; *Keltenbaugh v. Railroad*, 34 Mo. App. 147; *Pifer v. Stanley*, 57 Mo. App. 516; *Keeton v. Railroad*, 116 Mo. App. 281.

The point is ruled against defendant.

* * * * *

RAHLES V. J. THOMPSON & SONS MANUFACTURING COMPANY.

Supreme Court of Wisconsin. 1909.

137 Wisconsin, 506.

TIMLIN, J. The original complaint was quite inartistic. But after setting forth the age, nationality, and occupation of the plaintiff and his lack of knowledge of the English language and the corporate character and the business of the defendant, it averred lack of knowledge of machinery and of the dangers attending its operation and lack of experience on the part of the plaintiff. Defendant had and used a described drop hammer, out of repair and defective. Defendant, knowing the plaintiff's want of experience, and without instructing the plaintiff concerning his duties except as specified, and without warning the plaintiff that there was any danger in working about the drop hammer or that it was liable to fall, ordered the plaintiff to assist the operator of the drop hammer. Plaintiff, assisting without knowledge of the danger, was injured by

the hammer dropping upon his hand, which in consequence of this injury was amputated. That if the said defendant by its officers or agents, its superintendent and foreman acting as vice-principals, had warned or in any manner instructed the plaintiff as to the dangers and the use of the said hammer, the precautions to be taken about the same, plaintiff would not have been injured in any manner and would have avoided the said injury. Again:

“That the cause of the injury to this plaintiff was the neglect of the said defendant * * * to warn the said plaintiff of the dangers and of the dangerous condition of the said machine.”

No defect in the machine having been shown, but the evidence on the part of the plaintiff tending to show that the plaintiff accidentally stepped on the treadle of the drop hammer while having his hand in the path of the descending hammer, the defendant at the close of the plaintiff's evidence moved that the plaintiff be non-suited. Plaintiff then asked leave to amend his complaint, presenting an amended complaint, which is the same as the original complaint except that therein the negligence of the defendant was predicated, not upon any defect in the machine, but upon the ignorance and inexperience of the plaintiff, known to the defendant, and the failure of the defendant to instruct or warn the plaintiff before or at the time of placing plaintiff to work upon the drop hammer. The court allowed this amended complaint to be filed, whereupon counsel for the defendant asked for the “continuance of the case over the term, the immediate taxing by the clerk of this court of the taxable disbursements of the defendant down to this time, and the usual attorney fee of \$25. By the Court: The motion is granted upon the sole ground that \$10 costs be paid forthwith.” Exception to this ruling was taken, and error is assigned on this ruling.

We perceive no error in the ruling. It was proper to allow the amendment on the trial. *Gates v. Paul*, 117 Wis. 170, 94 N. W. 55. Where the complaint is amended on the trial, in order to entitle the defendant to a continuance he must make a showing, if not by affidavit, at least by a statement to the court based on the pleadings apparently supporting such statement, that he is unprepared to meet and cannot, with the evidence at hand or available, meet the

issues raised by the amended complaint. *Withee v. Simon*, 104 Wis. 116, 80 N. W. 77. The amendment here brought about no radical change of the issues and the terms were in the discretion of the court. *Ill. S. Co. v. Budzisz*, 106 Wis. 499, 82 N. W. 534; *McIlquham v. Barber*, 83 Wis. 500, 53 N. W. 902; *Pellage v. Pellage*, 32 Wis. 136, 141; *Schaller v. C. & N. W. R. Co.*, 97 Wis. 31, 71 N. W. 1042. * * *

* * * * *

SECTION 2. ABSENCE OF WITNESS.

CAMPBELL V. DREHER.

Court of Appeals of Kentucky. 1908.

33 Kentucky Law Reporter, 444.

LASSING, J. In a collision between appellee, a 16-year-old boy, on a bicycle and appellant's automobile appellee was injured. Conceiving that his injuries were the direct result of appellant's negligence in operating his machine, appellee, through his father as next friend, instituted suit to recover damages. Appellant denied liability, and pleaded that the injuries, if any, to the boy were the result of his own carelessness and negligence. Upon the issues thus joined a trial was had, which resulted in a verdict in favor of appellee for \$500. To reverse this judgment this appeal is prosecuted.

Appellant relies upon four grounds: * * *; second, because the trial court erred in refusing him a continuance on his showing, made at the time of the trial, that the witness Dr. Geo. W. Leachman, was absent from the state, and that his testimony could not be procured at that time; * * * *

* * * * *

Appellant's second ground for reversal is not well taken for two reasons: First, it is not shown that he used any diligence whatever to secure the presence of this witness at his trial. The record shows that his answer was filed on the 15th day of December, 1906. The reply was filed on the

22nd day of December, 1906, completing the issues. The case was called for trial the 26th of March, 1907, or more than 90 days after the issues were made up. During all of this time, save about two weeks prior to the date of the trial, as shown by the affidavit, the witness, Dr. George W. Leachman, was within the jurisdiction of the court, and could have been subpoenaed, and his attendance procured. This was not done, and the fact that appellant did not know he was going to leave offers no excuse for his failure to have a subpoena issued for this witness at a time when he knew he was within the jurisdiction of the court and could have been served. The court did not err in refusing to continue the case because of the absence of this witness for the further reason that it is shown that his evidence would have been merely cumulative. He was in the automobile with the witness John Straus, and the facts to which he would have testified, if present, as disclosed by the affidavit, were testified to by the witness John Straus. The ruling of the trial judge, in permitting this affidavit for continuance to be read as the deposition of the absent witness, was certainly as favorable to appellant as he could ask.

* * * * *

Perceiving no error in the conduct of the trial prejudicial to the rights of appellant, the judgment is affirmed.

TERRAPIN V. BARKER.

Supreme Court of Oklahoma. 1910.

26 Oklahoma, 93.

This action was brought in the District Court of Washington county by defendant in error to recover for services rendered by him to plaintiff in error as an attorney, of an alleged reasonable value of \$1,000, and for expenses incurred and paid out by him for plaintiff in error in rendering said services. From a verdict and judgment in favor of defendant in error, hereafter called "plaintiff," plaintiff in error, hereafter called "defendant," brings this proceed-

ing in error. The facts alleged in the pleadings and established by the evidence, in so far as they are necessary in the consideration of the questions presented by this proceeding, will be stated in the opinion.

* * * * *

HAYES, J. (after stating the facts as above.) After announcement of both parties in the trial court that they were ready for trial, a motion by defendant to strike out certain portions of plaintiff's reply to his answer was overruled, and he thereupon filed a motion for continuance, which was also overruled. His motion for continuance stated, that he was informed that two certain persons who were absent had information material to his case; that he has a right to expect that they would be in attendance at the trial of his cause. Section 5836 of the Compiled Laws of Oklahoma of 1909 prescribes what an application for continuance on account of the absence of evidence shall contain. It must show the materiality of the evidence expected to be obtained; that due diligence has been used to obtain it; where the witnesses reside, if their residence is known to the party; the probability of procuring their testimony within a reasonable time; and what facts mover believes the witness will prove; and that he believes them to be true.

The motion in this case fails to contain several of these essential elements. No showing whatever is made in the application of any diligence used by plaintiff in error to obtain the attendance of the absent witnesses; nor does the affidavit state the residence of but one of said witnesses. No showing is made that their testimony can be procured within a reasonable time; nor is any statement made as to any facts that can be established by them that would be material to the case. It is stated that if one of the witnesses was present he would testify that, "so far as he is informed, defendant in error was not plaintiff in error's attorney in the matter in which he alleges he rendered the services for plaintiff in error." But such evidence would be incompetent. The witness could not be permitted to testify as to his information. The application also fails to state that applicant believes that the alleged facts which the absent witness will testify to are true. An application for continuance could hardly be more defective than the

one here relied upon. It is not an abuse of discretion to overrule an application for continuance, where no diligence is shown to procure the attendance of the witnesses. (*Swope & Son v. Burnham, Hanna, Munger & Co.*, 6 Okla. 736, 52 Pac. 924; *Kirk v. Territory*, 10 Okla. 46, 60 Pac. 979), and the party applying must clearly state the facts he expects to prove, and their materiality must be made to appear from the application (*Murphy v. Hood, et al.*, 12 Okla. 593.) And even when all the matters prescribed by the statute are set forth in an affidavit for continuance, a continuance will not be granted, if the adverse party consents that on a trial the facts alleged in the affidavit shall be read and treated as a deposition of the absent witness. Section 5836. *supra*; *Chandler v. Colcord*, 1 Okla. 260, 32 Pac. 330. Defendant is in no position to complain that his motion was overruled, for plaintiff would, in all events have been entitled to know what facts he intended to establish by the absent witnesses, in order that he might determine whether he would admit that the witness would so testify; and that such facts might be read to the jury as a deposition of the absent witnesses, rather than to suffer the inconvenience of a continuance.

* * * * *

Finding no error in the record requiring a reversal, the judgment of the trial court is affirmed.

All the Justices concur.

BEAN V. MISSOULA LUMBER COMPANY.

Supreme Court of Montana. 1909.

40 Montana, 31.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

* * * * *

Contention is made that the court erred in refusing to grant to defendant a postponement of the trial because of the absence of one Wendorf, a witness who was expected to be present and testify in defendant's favor. The appli-

cation was made upon affidavit by defendant's counsel. Besides setting forth the facts to which the witness would testify, the affidavit shows that the witness was a resident of the state of Idaho; that he was then in that state and had been for some months; that he was the only witness who could testify to the facts set forth; that the defendant expected to have him present, but that, after the cause was set for trial, counsel ascertained that he was ill at his home and was unable to attend; and that, if granted a postponement, he could secure the attendance of the witness in person. However meritorious the application may have been in other respects, it was properly denied, because it wholly failed to show diligence by defendant in its efforts to secure the evidence of the witness. The cause had been at issue for several months. The witness was a non-resident of the state of Montana, and beyond the jurisdiction of the court. If the defendant chose to rely upon his promise to attend—if he did make such promise—it did so at its own risk. Under the circumstances, the only safe course to pursue was to take the deposition of the witness. The refusal to grant a continuance was, under the circumstances, not such an abuse of discretion as to call for interposition by this court. The case of *State v. Metcalf*, 17 Mont. 417, 43 Pac. 182, cited by counsel, is not in point. Though the application there made showed that the witness resided in the state of Kansas, it appeared that the defendant knew nothing of his whereabouts until within so short a time before the trial that it was impossible to take his deposition, and the postponement was asked in order that the defendant might be given time to take it.

* * * * *

Let the judgment and order be affirmed.

Affirmed.

MR. JUSTICE SMITH and MR. JUSTICE HOLLOWAY concur.

HARTFORD FIRE INSURANCE COMPANY V.
HAMMOND.

THE LIVERPOOL AND LONDON AND GLOBE IN-
SURANCE COMPANY V. HAMMOND.

Supreme Court of Colorado. 1907.

41 Colorado, 323.

MR. JUSTICE BAILEY delivered the opinion of the court:

The same questions are presented in each of these cases, and we will, therefore, dispose of them in one opinion.

The first contention is that the court should have granted a continuance of the trial, asked for by defendants, appellants here. It appears that Charles F. Hawkins was a material witness on behalf of the defendants and that he was ill and unable to attend the trial. Because of his absence, defendants requested a postponement and filed an affidavit wherein were stated the facts which Hawkins had been expected to testify to. Plaintiff objected to a continuance and admitted that if the witness, Hawkins, were present he should testify as stated in the affidavit. When this was done the application for a continuance upon that ground was properly overruled.—Code of Civil Proc., sec. 177; *Baldwin Coal Co. v. Davis*, 15 Colo. App. 371; *Florence Oil Co. v. Oil Well Supply Co.*, 38 Colo. 124.

* * * * *

We are unable to find any error in the proceedings in these cases, and therefore, are of the opinion that each of the judgments should be affirmed.

Affirmed.

CHIEF JUSTICE STEELE and MR. JUSTICE GODDARD concur.

BROWN V. ABILENE NATIONAL BANK.

*Supreme Court of Texas. 1888.**70 Texas, 750.*

STAYTON, CHIEF JUSTICE. On January 25, 1886, the Abilene National Bank brought an action against B. M. Daugherty on several promissory notes, and sued out a writ of attachment that was levied on property belonging to Daugherty. On March 9, 1886, the appellant filed a plea in intervention, in which he alleged that he had also brought an action against Daugherty, and caused a writ of attachment to be levied on the property which the appellee had first caused to be attached. The intervenor set up several grounds on which he claimed that precedence should be given to the lien acquired through the attachment sued out by him. On March 12, 1886, a judgment was rendered in favor of the appellee against Daugherty, whereby the attachment lien was foreclosed and the proceeds of the attached property—the same having been sold and deposited with the clerk—was directed to be paid to the appellee. By that judgment no disposition of the intervention was made.

On April 2, 1886, the appellee announced ready for trial on the matters set up in the intervention, and the intervenor made an application for continuance, which was by the court overruled, and a judgment was then rendered in favor of the appellee against the intervenor, who offered no evidence. The action of the court in refusing a continuance is assigned as error.

The ruling of the court refusing a continuance, was on the ground that the intervenor could not delay the appellee in the assertion and collection of his claim against Daugherty. In view of the grounds on which the continuance was sought, it is unnecessary to inquire whether an intervenor, in any case, is entitled to a continuance whereby a plaintiff will be delayed in the collection of a judgment against a defendant; or, if he be so entitled, to determine on what terms a continuance upon sufficient showing should be granted. The application for a continuance was based on the absence of witnesses, and it showed that subpoenas for them were obtained by the intervenor on the day that he

filed his pleadings in intervention, but it did not show when they were placed in the hands of an officer for service. It showed that the witnesses had been served, but did not state when they were summoned.

When a first application for a continuance is sought, by one entitled to ask it, for the want of testimony, the statute requires that such applicant shall state "That he has used due diligence to procure the same, stating such diligence." (Rev. Stats., art. 1277.) No such statements are found in the application, which was verbal, and is contained in a bill of exceptions. On an application for a continuance, a court will not assume a necessary fact to exist when the applicant fails or is unwilling to state its existence. Every fact stated in the application may be true, and still due diligence not have been used.

The time when the subpoenas were served on the witnesses should have been stated, in order that the court might determine whether this was such reasonable time before the trial as would enable the witnesses to be present. (*Conner v. Sampson*, 22 Texas 20; *Stanley v. Epperson*, 45 Texas, 650.) No facts are shown by the application which can take this case out of the general rule.

There is no error in overruling the application for continuance, and the judgment will be affirmed.

Affirmed.

SECTION 3. ABSENCE OF ATTORNEY.

CICERELLO V. CHESAPEAKE & OHIO RAILWAY COMPANY.

Supreme Court of Appeals of West Virginia. 1909.

65 West Virginia, 439.

MILLER, President.

The plaintiff, as personal representative of Frank Olvino, deceased, seeks recovery of damages from defendant, for negligently causing the death of decedent on February 8th, 1907, while employed by Rinehart and Dennis, inde-

pendent contractors, near Scott Station, in Putnam county, in excavating and widening a hillside cut for another track along defendant's main line. Olvino's duty, as alleged, was to keep defendant's main track cleared of the dirt and rock which fell from the steam shovel employed in making the excavation. The negligence charged is, that defendant's servants and employes so carelessly and negligently and with such great force and violence drove and struck against the said Frank Olvino, a certain locomotive with cars attached, thereby inflicting upon him such severe and fatal wounds and injuries, that he then and there died.

On the trial there was a verdict and judgment for the plaintiff for \$1,500.00, and for errors alleged to have been committed preliminary to and during the progress of the trial, and for refusal of the court below to set aside the verdict and award defendant a new trial, the defendant seeks a reversal of the judgment below.

Of the preliminary rulings complained of, the first is, that the court refused to continue the case on motion of defendant, when called for trial, because of the absence of F. B. Enslow, defendant's leading counsel; and because of the absence of J. B. Thomas, one of its witnesses; and the second is, the rejection of defendant's special plea number two tendered. The motion to continue was supported by the affidavits of said Enslow and R. M. Baker, another attorney for the defendant. Baker was also cross examined on the matter of his affidavit, and the clerk of the court was also examined in relation to the issuance of subpoenas for the witnesses, and the want of service and return thereof. This evidence shows that Enslow was necessarily absent in attendance upon the United States Circuit Court of Appeals at Richmond, on the day this case was set for trial, but that Baker, who assisted in the conduct of the trial on behalf of the defendant, was present. The record of the trial shows that Enslow was a member of the well known firm of Simms & Enslow, or Simms, Enslow, Fitzpatrick and Baker, that defendant's special plea number two was signed by Alexander & Barnhart and R. M. Baker, Attorneys, and not by either of the other firms of which Enslow was a member, and that Mr. Alexander was also present and assisted in the trial, and that the defense was conducted with skill and ability. In the case of *Rossett v.*

Gardner, 3 W. Va. 531, relied upon, upon the question of the absence of counsel, it was shown that appellant had used due diligence to be prepared for trial; that one of his counsel was unavoidably absent, and that the other, though present on a preceding day, was for some cause, not explained in the record, absent when the cause was heard, and the appellant was left without the aid of any counsel. In the present case defendant had able counsel present to conduct the trial. In the case of *Myers and Axtell, Receivers, v. Trice*, 86 Va. 835-841-2, the absence of leading counsel on account of sickness, in connection with the absence of an important witness, not summoned by reason of mistake in name, was held good cause for continuance, and denial of the continuance was, on writ of error, held sufficient cause for a reversal of the judgment. Several cases are cited by the Virginia court in support of its ruling, two from Georgia, one United States Circuit Court decision, and the case of *Rhode Island v. Massachusetts*, 11 Peters 226. In the latter case, says the Virginia Court, a continuance was granted by the Supreme Court of the United States upon the ground that the leading attorney for the state of Rhode Island was ill, although the attorney general of that state was present. The case was of exceptional importance says the court, and that the inference was that the court was influenced more by the deep concern and the high importance of the case than by any purpose to exemplify the rule in such cases. "In all such cases, however," says the Virginia court, "the application should be watched with jealousy, and the discretionary power of the court exercised with caution; but if there is no sufficient reason to induce the belief that the alleged ground of the motion is feigned, a continuance should be granted, rather than to seriously imperil the just determination of the cause by refusing it." This court further says: "Under the peculiar circumstances of the present case, and especially in view of the very harsh ruling on the preceding motion, we are clearly of opinion that the circuit court erred in refusing to continue the case on the ground of the absence of the leading counsel of the defendants, by reason of sickness."

With respect to the absence of the witness Thomas, the evidence shows that he was or had been in the employ of the

defendant company, was in fact the fireman on the engine at the time of the killing of Olvino; that a subpoena for him and another witness was secured from the clerk only six days before the case was called for trial and sent to the company's counsel at Huntington; that no return of service thereof on Thomas was made, and the testimony of Baker, counsel for defendant on cross-examination, shows that he sent the subpoena for Thomas to the company's superintendent requesting him to secure the presence of Thomas, who, he was told, was at Hinton, and gave directions that an order be given him on the ticket agent there for transportation. He did not know whether Thomas had been served or provided with transportation. We do not think the record shows due diligence on the part of defendant to secure the presence of Thomas. Besides he was only one of the numerous witnesses present at the time of the killing of the deceased, including the engineer, and who were present and examined as witnesses on the trial and gave testimony. Motions for continuance are generally addressed to the sound discretion of the trial court. The judgment of the court thereon not being reviewable on writ of error and appeal unless there has been manifest abuse of such discretion. *Mullinax v. Waybright*, 33 W. Va. 84; *Halstead v. Horton*, 38 W. Va. 727; *State v. Lane*, 44 W. Va. 730. It was not shown what was proposed to be proven by the witness. Where the motion to continue is based on the absence of a witness it must be shown that proper diligence to secure his presence has been used, and if there is any ground to suspect that the continuance is for delay, it must appear what evidence the absent witness is expected to give. *State v. Brown*, 62 W. Va. 546. In *Thompkins v. Burgess*, 2 W. Va. 187, and *Dimmey v. Wheeling, etc., R. Co.*, 27 W. Va. 33, it is said that on such motion it must be shown that the same facts cannot be proved by any other witness in attendance and that the party whose witness is absent cannot proceed in the absence of such witness. The affidavit of Baker, is that the witness is material and that defendant cannot prove the same facts by any one else, *as he is informed*; but on cross examination it is shown that he does not know what Thomas will swear, except from his report. It is not shown what this report was. It is suggested in brief of counsel, however, that as Thomas

was fireman on the engine that killed deceased, he would be a material witness, he and the engineer being the only two persons on the engine, and that each seeing what occurred from different points of view, this rendered Thomas a most important witness. But other witnesses were present and gave testimony as to what was seen and heard by them from their several view points, including the ringing of the bell and the blowing of the whistle, and we cannot see that the defendant was greatly prejudiced by the absence of Thomas. We cannot say from this record that there was any abuse of the discretion of the court on the motion to continue. We do not think this a parallel case to the Virginia case. Evidently the court there was more influenced by the arbitrary ruling of the trial court in refusing to continue on the ground of the absence of an important witness than because of the absence of counsel.

Affirmed.

RANKIN V. CALDWELL.

Supreme Court of Idaho. 1908.

15 Idaho, 625.

STEWART, J. This is an action to recover possession of two diamond rings, alleged to be of the value of \$250 each. The plaintiff alleges that she is the owner and entitled to the possession of said property. The plaintiff did not file the affidavit provided for by the statute, where immediate delivery is claimed. The defendant answers the complaint and denies the plaintiff's ownership and right of possession of said rings, and denies that they are of the value of \$250 each, or any greater sum than \$125 each. The defendant admits that he holds and detains said property from the possession of plaintiff, but denies that he does so unlawfully, and alleges that said rings were pledged to him as security by one Harry Noyes, and that such pledge was made by and with the consent and approval of the plaintiff. The case was set for trial before a jury sometime prior to February 5, 1908, and when the case was called for trial

on February 5th, the defendant made a motion for a continuance and filed his affidavit made on that day in which he swears "that he cannot safely go to trial at this term of the above-entitled court on account of the absence of his attorney, John Green, who is confined to his bed with illness in Culdesac, Nez Perce county, state of Idaho, and conduct the trial of this case; that affiant did not know that the said Green would be unable to appear in court at the time this case was set for trial until yesterday morning, the 4th day of February, A. D. 1908; that affiant has consulted no other attorney regarding this case, and had retained no other attorney, and it would be an injustice to affiant to compel him to go to trial without the presence of his attorney.

"That affiant expects to have present for the purpose of testifying in this cause at the trial of the same one George Martin, who is the cashier of the Bank of Culdesac, and who is confined to his bed with illness, and unable to appear to attend the trial of this cause; that affiant did not have a subpoena issued for the said George Martin, for the said Martin agreed and intended to attend upon the trial of this cause, and would have been present had he not been detained on account of illness."

The affidavit then continues to set forth what the affiant claims Martin will testify to if present at the trial. An affidavit of Dr. E. L. Burke was also filed, to the effect that Mr. Green was suffering with la grippe, confined to his bed under the instruction of the physician, and that it would be injurious and probably fatal for him to leave his bed or make any effort whatever to appear as an attorney on the 5th day of February. The affidavit of Mr. Green, made February 4th, was also filed to the effect that he was attorney for the defendant in the above action, and that the defendant had consulted no other attorney concerning his interest in said action, and that he was unable to appear in the district court on the 5th as attorney for the defendant, because of illness.

The district court overruled the motion for a continuance, and the cause went to trial before a jury and a verdict returned for the plaintiff, assessing the damages at \$450. A motion for a new trial was made and overruled, and this appeal is from the judgment and from the order overruling

the motion for a new trial. The first error assigned is, that the trial court erred in overruling the motion for a continuance. It will be observed from an examination of the affidavit that the continuance was asked for upon two grounds: first, because of absence of counsel on account of illness; second, on account of absence of witness, because of illness and failure to attend. The affidavit shows that John Green, defendant's counsel, was ill and unable to attend the trial of said cause; that defendant had knowledge of this fact on the 4th day of February, the day prior to the day upon which the cause was set for trial. The defendant made no effort to secure other counsel and there is no showing in the affidavit that the case was in any way complicated or difficult, or that other counsel could not have been procured who could have familiarized himself with and properly tried said case on the 5th. In this respect the affidavit is insufficient. A party to a suit cannot have a postponement of the trial upon the ground of illness of counsel, without showing diligence on the part of such applicant to secure other counsel or to consult other counsel as to the merits of the case for the purpose of ascertaining whether or not other counsel can be secured who can properly try said case. If the mere fact that counsel for the applicant is ill is sufficient to secure a continuance, then it might be possible to prevent a cause from ever reaching trial. The applicant must show diligence on his part in supplying the place of the counsel who is ill, or show some reason why it is not done. A motion for a continuance is addressed to the sound discretion of the trial court, and his ruling thereon will not be disturbed on appeal, unless it appears that there has been an abuse thereof. (*Herron v. Jury*, 1 Ida. 164; *Lillienthal v. Anderson*, 1 Ida. 676; *Cox v. Northwestern Stage Co.*, 1 Ida. 376; *Richardson v. Ruddy*, 10 Ida. 151, 77 Pac. 972; *Robertson v. Moore*, 10 Ida. 115, 77 Pac. 218; *Holt v. Gridley*, 7 Ida. 416, 63 Pac. 188; *Reynolds v. Corbus*, 7 Ida. 481, 63 Pac. 884.)

It is not an abuse of the legal discretion vested in the trial court to deny an application for a continuance upon the sole ground that applicant's counsel is ill, where no affidavit of merits is filed showing that the applicant has a meritorious cause or defense and that other counsel cannot be procured who are able to try said case. (*Condon v. Brockway*,

157 Ill. 90, 41 N. E. 634; *Harloe v. Lambie*, 132 Cal. 133, 64 Pac. 88; *Berentz v. Belmont Oil Co.*, 148 Cal. 577, 133 Am. St. Rep. 308, 84 Pac. 47; *Thompson v. Thornton*, 41 Cal. 626.) As to the sufficiency of the affidavit on account of the absence of a witness, the affidavit as to the absence of the witness Martin does not show the facts upon which the statement is made that the witness is ill and unable to attend said trial. The affidavit does not allege that the applicant knows this as a fact, or disclose from whom he procured the information, or that he himself or the person from whom he procured the information was qualified to say that such witness was too ill to attend said trial. It does not disclose whether the statement is made upon personal knowledge of the affiant or upon information. Neither does the affidavit show any diligence exercised by the applicant to procure the attendance of the witness. The fact that the witness agreed to be present is not such a showing of diligence as will be sufficient to secure a continuance for failure of such witness to attend. A party is not entitled to a continuance of a cause without showing due diligence and the use of legal means to procure the desired evidence. A bare request to furnish the evidence is in no sense a compliance with the requirements of the law. (*Alvord v. United States*, 1 Ida. 585; *Kuhland v. Sedgwick*, 17 Cal. 123; *Lightner v. Menzel*, 35 Cal. 452.) For these reasons the court committed no error in overruling the motion for a continuance.

* * * * *

We find no error in the record in this case, and the judgment will be affirmed. Costs awarded to respondent.

ALLSHIE, C. J., and SULLIVAN, J., concur.

SECTION 4. ABSENCE OF PARTY.

JAFFE V. LILIENTHAL.

*Supreme Court of California. 1894.**101 California, 175.*

HAYNES, C.—On the 21st of December, 1891, this cause was set for trial for January 6, 1892. On that day plaintiff's attorney moved for a continuance upon affidavits of the plaintiff and his physician showing in substance that the plaintiff, who then and for about a year prior thereto resided in Seattle, Washington, was confined to his room by an attack of acute rheumatism to which he was subject, and was wholly unable to move or leave his room, and in the opinion of his physician would not be able to leave his room in less than two months. The affidavit of plaintiff further stated that his presence at the trial was indispensably necessary; that he was the only person who knew the whereabouts of the witnesses necessary to be called on his behalf; that their names had not been communicated to his attorney, nor the matters to which they would testify. D. M. Delmas, Esq., attorney for plaintiff, also presented his own affidavit that plaintiff's presence was necessary, that he did not know the names of plaintiff's witnesses, nor the details of the case.

No counter-affidavits were presented. The continuance was denied, plaintiff's attorney left the courtroom, and a judgment was entered for nonappearance of the plaintiff, and the plaintiff appeals.

* * * * *

We think the court erred in not granting a continuance.

Respondent suggests that it does not appear that plaintiff was a witness, nor that his attorney used any diligence to prepare for the trial.

It seldom happens that a trial can be properly had in the absence of the plaintiff, even where he is disqualified as a witness, especially where it is to be tried upon oral testimony. With all the care that can reasonably be taken by both attorney and client, some matter of vital importance is liable to be overlooked by them until the trial calls it to the recollection of the plaintiff, and this is especially true in relation to matters purely in rebuttal. It is the right

of parties to be present at the trial of their cases. This right may be waived, and should be held to be waived where the absence of the party is voluntary and under circumstances which ought not to induce a reasonable man having a due regard for the rights and interests of others and of the public, all of whom are interested in the due and prompt administration of justice, to absent himself.

So far as the want of preparation on the part of the attorney is concerned, the most laborious and painstaking preparation on his part would not have prevented the sickness and absence of his client; nor does it appear that if the plaintiff had not been sick the necessary preparation could not have been made after the case was set for trial.

Respondent further contends that the affidavits do not show the materiality of the evidence expected to be obtained.

The application for continuance was not made under section 595 of the Code of Civil Procedure, but under section 594, which authorizes the court "for good cause" to postpone the trial in the absence of a party. The consequences of a dismissal of an action because of the absence of a plaintiff should always be considered, especially where any reasonable excuse is shown for his absence, as where a plea of the statute of limitations could be interposed to a new action. In such case the dismissal is the absolute destruction of the plaintiff's right, and so serious a penalty should not be imposed unless the due administration of justice clearly requires it.

The judgment appealed from should be reversed.

VANCLIEF, C., and SEARLS, C., concurred.

For the reasons given in the foregoing opinion, the judgment appealed from is reversed.

FITZGERALD, J., DE HAVEN, J.

McFARLAND, J.—I concur in the judgment.

SECTION 5. WITHDRAWAL OF JUROR.

USBORNE V. STEPHENSON.

*Supreme Court of Oregon. 1899.**36 Oregon, 328.*

* * * On the day set for the trial, but before the jury was called, the plaintiff moved for a continuance on account of the absence of material testimony; basing his motion upon an affidavit of his counsel to the effect that he could not safely proceed to trial without the depositions of several residents of London. The motion being denied, a jury was impaneled and sworn; but, before any evidence had been given, the plaintiff filed a motion for permission to withdraw a juror, based upon an affidavit of his counsel substantially the same as the one filed in support of the motion for a continuance, except that it contained a statement to the effect that the cause had been set down for hearing in violation of a verbal understanding and agreement with counsel for defendants, which, however, was denied by a counter affidavit. This motion was likewise denied, and the cause proceeded to trial, resulting in a judgment in favor of defendants for the sum of \$537.04, from which the plaintiff appeals, assigning as error the overruling of his motion to withdraw a juror, and certain instructions given to the jury.

Affirmed.

MR. JUSTICE BEAN, after stating the facts, delivered the opinion of the court.

1. This is the first attempt, so far as we are advised, to invoke in this state the practice of withdrawing a juror. There is but little satisfactory information to be obtained from the books in regard to the ancient practice, which used to be resorted to when a party was taken by surprise on a trial, of withdrawing a juror, and thus causing a mistrial, and, of necessity, a postponement of the case. It was originally confined to criminal cases, and seems to have been adopted for the purpose of avoiding a rule which once obtained, based largely upon a dictum of Lord Coke, that a jury sworn and charged in any criminal case could not be

discharged without giving a verdict. To escape the effect of this rule, and yet apparently observe it to the letter, the courts resorted to the fiction of directing the clerk to call a juror out of the box, when it appeared that the prosecution was taken by surprise on the trial, whereupon the prosecution objected, or was supposed to object, to proceeding with the eleven jurors, and the trial went over for the term: 2 Hawk, P. C. 619; 2 Hale, P. C. 294; *Wedderburn's Case*, Fost. 22; *People v. Olcott*, 2 Johns. Cas. 301 (1 Am. Dec. 168); *United States v. Coolidge*, 2 Gall. 363 (Fed. Cas. No. 14,858). It was nothing more, however, than a means of obtaining a continuance or postponement of the trial after the jury had been impaneled and sworn. At first it was thought this could be done only by the court ordering the discharge of one of the jurors, and then holding that, as the case could not be tried before the remaining eleven, it must be continued. But after the doctrine of Lord Coke had been repudiated, and it became the settled rule that it was within the power of the court, in a proper case, to discharge the jury after it had been impaneled and sworn, and continue the cause, the device of withdrawing a juror seems to have become practically obsolete, and but little, if any, reference to it as a substantive practice is to be thereafter found in the books. That it ever prevailed at common law in civil cases is very doubtful. No case has come under our observation in which it was resorted to in England. Indeed, the only reference we have been able to find to the question in the early authorities is a note to *Chedwick v. Hughes*, Carth. 464, in which it is stated that Lord Chief Justice Holt, in a case of perjury tried before him, said that it was the opinion of all the judges of England, upon debate between them, that in civil cases a juror cannot be withdrawn but by consent of all parties. And while the authority of this note underwent a critical examination in the subsequent case of *Sir John Wedderburn*, Fost. 28, from which its authority is rendered rather questionable, it seems to be the only reference to the practice in civil cases. It was early ruled, however, in this country, by the courts of New York, after some hesitation, that a court may allow a juror to be withdrawn in a civil case, when necessary to save the plaintiff from the consequence of a fatal mistake in his testimony: *People v. Judges of*

New York, 8 Cow. 127. And we believe it is still regarded as a proper practice in that state, and is open to either party: Bishop, Code Pl. sec. 428; *Dillon v. Cockcroft*, 90 N. Y. 649; *Messenger v. Fourth Nat. Bank*, 48 How. Prac. 542. But, so far as we have been able to ascertain, it does not prevail elsewhere in this country; the same result being accomplished by a direct application to the court for a postponement of the trial: 4 Enc. Pl. & Prac. 863. We are therefore of the opinion that the motion was properly denied on the ground that no such practice prevails in this state.

2. But, however that may be, whatever authorities there are on the subject all agree that the practice can be resorted to only when a party finds himself taken by surprise on the trial, and when further proceeding therewith would be productive of great hardship or manifest injustice to him. Mr. Bishop, in the section of his work on Code Pleading already recited, in speaking of the New York practice, says: "Instead of submitting to a nonsuit, the plaintiff, if he finds himself taken by surprise on the trial,—as by the absence of a witness who has been in attendance, or by the unexpected presentation of evidence by his adversary which he is not prepared to meet, or by any accident which might render the further progress of the trial disastrous and unfair to him,—may ask the court to withdraw a juror. The result of this application, if granted, will be to produce a mistrial; and the court may then continue the pending action, and set the trial over to a future day, when the plaintiff may come properly prepared to try the case afresh." Within this rule, the plaintiff's motion was likewise properly denied, because it is not based upon anything occurring at the trial, but upon matters happening long prior thereto, and which could be, and were, properly submitted to the court in support of the motion for a continuance made before the jury was empaneled.

* * * * *

This disposes of the questions made on the appeal, and, there being no error in the record, we have no alternative but to affirm the judgment.

*Affirmed.*¹

¹The practice of withdrawing a juror in civil causes is familiar in several states. *Rosengarten v. Central Railroad Company of New Jersey*, (1903) 69 N.

J. L. 220, 54 Atl. 564; McKahan v. Baltimore & Ohio R. R. Co., (1909) 223 Pa. St. 1, 72 Atl. 251; Smith v. Chicago Junction Ry. Co., (1906) 127 Ill. App. 89; Crane v. Blackman, (1901) 100 Ill. App. 565; Cattano v. Metropolitan Street Ry. Co., (1903) 173 N. Y. 565, 66 N. E. 563; Rawson v. Silo, (1905) 105 N. Y. App. Div. 278, 93 N. Y. Suppl. 416.

In Planer v. Smith, (1876) 40 Wis. 31, the court said: "The power of the circuit court, in a proper case, to permit a juror to be withdrawn, or to order a nonsuit, is undoubted; but there is no necessary connection between the two processes. The withdrawal of a juror operates to continue the cause, and does not of itself entitle the defendant to a judgment of any kind. If a nonsuit be properly granted, the withdrawal of a juror as preliminary thereto is entirely superfluous and harmless. But if judgment of nonsuit be rendered merely because a juror has been withdrawn, such judgment is founded upon a misapprehension of the legal effect of withdrawing a juror, and is erroneous."

SECTION 6. TERMS.

MAUND V. LOEB.

Supreme Court of Alabama. 1888.

87 Alabama, 374.

CLOPTON, J. The continuance of a case is in the discretion of the court, and such terms may be imposed, under the rule of practice, as to the court may seem proper. At the Fall term, 1888, of the Circuit Court, defendant obtained a continuance, upon payment of all the costs as a condition precedent, to be paid in ninety days, or judgment to go against him at the next term. The costs were not paid until the first day of the next term, and after the case was called for trial, which was more than ninety days from the time of the order. Defendant having applied for, obtained, and accepted the continuance, we must infer that he consented to the terms upon which it was granted. It was no excuse, that an itemized bill of costs had not been furnished, when it is not shown that defendant offered to pay the costs, or applied for such bill; and the court was not bound to accept payment after the expiration of the prescribed time, as a compliance with the condition upon which the continuance was obtained. The court was authorized to render judgment *nil dicit* against defendant. *Waller v. Sultzbacher*, 38 Ala. 318.

* * * * *

Affirmed.

CHAPTER V.

THE JURY.

SECTION 1. RIGHT TO A JURY TRIAL.

LEE V. CONRAN.

Supreme Court of Missouri. 1908.

213 Missouri, 404.

WOODSON, J. —This suit is based upon section 650, Revised Statutes 1899, to determine and quiet title to the lands described in the petition.

* * * * *

1. The first insistence of appellant is that the action of the trial court in refusing him a trial by jury was error.

So far as I am aware, this court has never passed directly upon the question as to whether or not the parties to a suit based upon section 650, Revised Statutes 1899, are entitled to a jury.

In order to properly determine that question we must first ascertain the nature of the issues joined and the remedy the parties are entitled to under the pleadings. If the issues joined entitled the parties to an ordinary judgment at law, then, under the Constitution and the laws of the State, the parties are entitled to a trial by a jury; but if the issues tendered are equitable in their nature and call for equitable relief, then the cause is triable before the chancellor.

Section 28 of article 2 of the Constitution of 1875 provides that "The right of trial by jury, as heretofore enjoyed, shall remain inviolate." This court, in the case of *State v. Bockstruck*, 136 Mo. l. c. 358, held that the constitutional guaranty of "the right of trial by jury as heretofore enjoyed" has reference to the status of that right as it existed at the time of the adoption of the Constitution. And this court, in the case of *State ex rel. v. Withrow*, 133

Mo. l. c. 519, held that said section 28 "means that all the substantial incidents and consequences which pertained to the right of trial by jury are beyond the reach of hostile legislation, and are preserved in their ancient substantial extent as existed at common law."

In order to determine whether the case at bar comes within the meaning of that section of the Constitution, as interpreted by those adjudications, we must first determine what the issue tendered by the pleadings is, and, after doing so, we must then ascertain how that issue was triable before the adoption of that constitutional provision; if by jury, then either party is entitled to a trial of that issue by a jury regardless of any statutory provision; but if it was not triable by jury prior to that time, then the Constitution does not govern, and we would then look to the statutes and the common law for a rule by which to solve the question.

We will first determine the nature of the issue presented by the pleadings. The petition charges that the plaintiff is the owner of the land described therein, and that defendant claims some interest or estate therein, the nature of which is unknown to plaintiff, except that it is adverse and prejudicial to his interests. The answer denies the allegations of plaintiff's ownership, and alleges that the lands are accretions; that plaintiff claims that they accreted to his patent land on the Missouri side of the Mississippi river; that he claims and charges the fact to be that they are accretions to an island formed and located in the Mississippi river; that under an act approved April 8, 1895, the title to such lands vested in the county for the use of the public schools; and that he purchased them from the county of New Madrid. When reduced to its final analysis, the issue is plainly one of accretion—that is, was the land in question accreted and added to the shore line of plaintiff's land, by gradual and imperceptible alluvial deposits, or was it added by that means to the lands of the island? If to the former, then the title is in plaintiff as charged in his petition; but if to the latter, then they belong to the defendant. That is the sole and only question presented by the pleadings; and that was the finding and judgment of the trial court.

Having determined that the issue is one of accretion, we

will now ascertain in what manner that issue was triable at common law and under the statute of this State prior to the adoption of the constitutional provision. I have been unable to find a case in this State where that precise question has been decided, yet by an examination of numerous cases, which fill our reports, involving the question of accretion, I find that they were invariably tried before a jury, except in a few cases where a jury was waived. In addition to that, I might add that during the thirty years I have been practicing law and occupying the bench, I have never seen or heard of a case in which it was contended that the question of accretion was not triable by a jury. Clearly that was the practice prior to the passage of section 650, Revised Statutes 1899, which was enacted in the year 1897. All suits in this State prior to that enactment involving questions of accretion were possessory actions, and were for the recovery of specific real property. In fact, without that section, I know of no way in which the question of accretion could be tried, except by ejectment, which has always been triable by jury, excepting, of course, those cases where the answer set up an equitable defense and crossbill and asked for affirmative relief, which were and are triable before the chancellor without the aid of a jury. If it be true that prior to the adoption of the constitutional provision mentioned the question of accretion was triable alone in some action involving the recovery of the specific land accreted, then under the express provisions of section 691, Revised Statutes 1899, which was enacted long prior to the adoption of the Constitution of 1875, the issue was triable by a jury. That section of the statute provides that, "An issue of fact in an action for the recovery * * * of specific real or personal property must be tried by a jury," etc.

From these observations it seems to be clear that the question of title by accretion was one triable by a jury prior to the adoption of said section 28 of the Constitution; and, consequently, in obedience to its mandate, any action involving that issue must still be triable by a jury regardless of any subsequent legislation upon the subject.

We are, therefore, of the opinion the court erred in refusing defendant a trial by a jury.

* * * * *

We are, therefore, of the opinion that the judgment should be reversed and the cause remanded for a new trial. It is so ordered.

All concur, except VALLIANT, P. J., absent.

SECTION 2. WAIVER OF JURY.

SCHUMACHER V. CRANE-CHURCHILL COMPANY.

Supreme Court of Nebraska. 1902.

66 Nebraska, 440.

POUND, C.

Although a number of difficult and interesting questions were argued, we need only consider the assignment that the court erred in denying the plaintiff a jury trial. The action is in ejectment. After the defendant had answered, plaintiff moved that the cause be transferred to the equity docket, for the reason that certain equitable defenses were set up. This motion was granted, the cause was transferred, and at the May term, 1900, the whole case was tried to the court, without objection, and a judgment rendered. At the same term this judgment was vacated and the cause re-submitted, without further trial, after which a new judgment was entered. Thereupon the plaintiff moved for a new trial under section 630, Code of Civil Procedure, and an order was entered, pursuant to said section, sustaining the motion and continuing the cause to the next term. At the February term, 1901, as the cause was coming on for trial, the plaintiff filed a written motion or demand that a jury pass upon the issues of a legal nature, namely, whether he had a legal estate in the premises in controversy and was entitled to possession thereof. The motion was overruled, and the request was denied, to which the plaintiff excepted. Thereafter, in due course, the whole cause was tried to the court, over plaintiff's objection, and findings and judgment were entered, from which he prosecutes error.

We are satisfied that the order transferring the cause to

the equity docket because of the equitable defenses set up in the answer did not preclude the party who procured the order from demanding that the purely legal issues be tried by jury, if his request for a jury trial was timely and was insisted upon. It has been decided that an order transferring a cause to the equity docket is not an adjudication that the parties are not entitled to a jury trial, and that if demand is made prior to the time the cause is called for trial, it is error to deny a jury. *Lett v. Hammond*, 59 Nebr. 339. In that case, the cause was transferred at the instance of one party, while the other demanded a jury. But the distinction would not be material unless it could be said that the application to have the cause transferred was an assertion that there was nothing for a jury to try, and estopped the moving party from assuming a contrary position subsequently. This can not be true, for the same reason that the order transferring the cause is not a decision whether the parties are entitled to a jury. The whole case is not of necessity triable to the court without a jury because there are incidental issues which are equitable in their nature. *Lett v. Hammond*, *supra*; *Yager v. Exchange Nat. Bank*, 52 Nebr. 321. By asking for the transfer, plaintiff merely asserted that there were equitable issues proper for the court to decide. He did not assert that there was nothing for a jury. Under a practice not unlike ours, it has been held more than once that consent that a case in which the facts require both equitable and legal relief should be placed on the equity docket for trial does not of itself waive the right to have the issues requiring purely legal relief tried by a jury. *Wheelock v. Lee*, 74 N. Y. 495; *Underhill v. Manhattan R. Co.*, 27 Abb. N. Cas. (N. Y.), 478; *Eggers v. Manhattan R. Co.*, 27 Abb. N. Cas. (N. Y.), 463. This must be so, since the practice of trying to the court the equitable defenses, by reason of which the right to maintain the action at law is challenged, and thereafter, if the disposition of the equitable defenses makes it necessary, trying the purely legal controversy, which is the gist of the case, to a jury, is well settled. *Arguello v. Edinger*, 10 Cal. 150; *Swasey v. Adair*, 88 Cal. 179, 25 Pac. Rep. 1119; *Basey v. Gallagher*, 20 Wall. (U. S.), 670; *Smith v. Bryce*, 17 S. Car. 538, 544. We think, therefore, that the motion to transfer the cause to the equity docket and the

order in accordance therewith, did not, of themselves, amount to waiver of a jury, especially as the equitable defenses in this case were relatively of little moment. There can be no doubt, however, that the plaintiff waived a jury at the first trial by going to trial upon all the issues without demanding a jury as to any of them. The statutory method of waiving a jury is not exclusive. Any unequivocal acts or conduct which clearly show a willingness or intention to forego the right, and are so treated by the trial court without objection, will have that effect. *McCarty v. Hopkins*, 61 Nebr. 550; *Poppitz v. German Ins. Co.*, 85 Minn. 188, 88 N. W. Rep. 438. When the whole case was tried and submitted to the court without objection, the right to a jury was waived. *Baumann v. Franse*, 37 Nebr. 807; *Gregory v. Lancaster County Bank*, 16 Nebr. 411.

It becomes necessary to consider next whether waiver of a jury at the first trial operated to prevent the plaintiff from demanding one at the second trial, after the judgment had been set aside under section 630, Code of Civil Procedure. The waiver arose by implication only, and was not made by stipulation or agreement in open court. But we do not think that circumstance material. In either event, when a trial has been had to the court, pursuant to the waiver, the waiver has done its work and lost its force; and when subsequently, for any reason, an entirely new trial becomes necessary, neither party is precluded by the action taken with reference to the former trial, but may demand a jury, or not, as he is advised or may elect. In *Cochran v. Stewart*, 66 Minn. 152, 68 N. W. Rep. 972, this very question was presented under circumstances not without analogy to the case at bar. The action was one in ejectment, and it was claimed that a waiver of a jury at the first trial operated to waive a jury at the second trial, obtainable as of course under the statute. The court held that it was of no force at the second trial, saying: "Conditions may be wholly different at the second trial from what they were at the first. There may be a different judge, and the jury to be obtained may also be different in character. Then it is hardly fair to presume that by waiving a jury for one trial the parties intended to waive a jury for any further trial that may be had under the statute, and we can not hold this to be the meaning of their agree-

ment." In *Cross v. State*, 78 Ala. 430, the court held for substantially the same reasons, that such a waiver should be construed, ordinarily, to apply only to the particular trial with reference to which it is made. And it seems to be well settled that the waiver will not prevent a demand for jury trial at a second trial after the cause has been remanded from an appellate court. *Hopkins v. Sanford*, 41 Mich. 243, 2 N. W. Rep. 39; *Benbow v. Robbins*, 72 N. Car. 422; *Osgood v. Skinner*, 186 Ill. 491, 57 N. E. Rep. 1041; *Burnham v. North Chicago St. R. Co.*, 32 C. C. A. 64, 88 Fed. Rep. 627. The many cases which hold that a waiver of jury trial may not be withdrawn are not in point, since, until the trial has been had, it may be said plausibly that the parties are bound by their election as to the form of trial. Moreover, there are well-considered authorities to the contrary. *Ferrea v. Chabot*, 121 Cal. 233, 53 Pac. Rep. 689, 1092; *Wittenberg v. Onsgard*, 78 Minn. 342, 81 N. W. Rep. 14, 47 L. R. A. 141; *Brown v. Chenoworth*, 51 Tex. 469. Neither is our conclusion affected by *Boslow v. Shenberger*, 52 Nebr. 164, 66 Am. St. Rep. 487. In that case, there had been a waiver, at a previous term, and it was presumed that the waiver was general, and not limited to the term at which it was made, in the absence of anything in the record to the contrary. No trial had been had, and until there was a trial, the waiver entered into with reference thereto remained in force.

We recommend that the judgment be reversed and the cause remanded for a new trial.

BARNES and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause is remanded for a new trial.

Reversed and remanded.

SECTION 3. OBJECTIONS TO THE PANEL.

LOUISVILLE, HENDERSON & ST. LOUIS RAILWAY
COMPANY V. SCHWAB.*Court of Appeals of Kentucky. 1907.**127 Kentucky, 82.*

Opinion of the Court by JUDGE CARROLL—Reversing.

Appellee, alleging that she was injured in a collision between a freight train operated by appellant Louisville, Henderson & St. Louis Railway Company and one of the cars of appellant Louisville Railway Company, caused by the negligence of the companies, brought this action to recover damages from each of them. A trial was had before a jury, and a verdict rendered against both appellants.

The principal error assigned by appellants is the failure of the trial court to sustain the motion made by them at the beginning of the trial to discharge the panel for misconduct of the jury commissioners in failing to select the jurors in the manner prescribed by the statute, "in that the commissioners did not write the name of each juror on a slip of paper and place them in the drum wheel, but merely checked off names on the assessor's book and employed others not under oath to do the really important work of writing off the names and putting them in the wheel; the persons so employed not being under the direct supervision of the commissioners, who did not know whether they did the work assigned to them right or wrong." * * *

* * * * *

Ky. St. 1903, section 2241, provides in part that "the circuit judge of each county shall at the first regular term of circuit court therein after this act takes effect, and annually thereafter, appoint three intelligent and discreet housekeepers of the county, over twenty-one years of age, residing in different portions of the county, and having no action in court requiring the intervention of a jury, as jury commissioners for one year, who shall be sworn in open court to faithfully discharge their duty. They shall hold their meetings in some room to be designated by the judge, and while engaged in making the list of juries and selecting the names, writing and depositing or drawing them

from the drum or wheel case, no person shall be permitted in said room with them. They shall take the last returned assessor's book of the county and from it carefully select from the intelligent, sober, discreet and impartial citizens, resident housekeepers in different portions of the county, over twenty-one years of age, the following number of names of such persons, to-wit: (then follows the number that shall be selected from each county, graded according to the population.) Each name so selected they shall write in plain handwriting on a small slip of paper, each slip of paper being as near the same size and appearance as practicable; and each slip with the name written thereon shall be by them enclosed in a small case made of paper or other material and deposited unsealed in the revolving drum or wheel case hereinafter provided for."

In answer to the argument made for appellants, it is said for appellee that the record does not show that the substantial rights of appellants were prejudiced by the action of the court in overruling the challenge to the array; * * * The record does not disclose that the members of the panel from which the jurors were selected to try the case were in any respect objectionable, and in this particular the substantial rights of appellants were not prejudiced by the rulings of the trial court; but, in a matter that strikes at the very foundation of our system of selecting jurors, we do not deem it material or necessary that any prejudicial error shall be made to appear, other than a substantial one committed in failing to select the juries in the manner pointed out in the statute. It is probable that the jurors selected to and that did try this particular case were men who possessed all the statutory qualifications; and it may also be conceded that they were entirely acceptable to counsel and parties on both sides. But back of this is the more important question that litigants have the unqualified right to demand that juries shall be selected in the manner prescribed in the statute, and in passing on this right the individual qualification of the juror or the fact that he may be entirely acceptable to the parties is not to be considered. If the contention of appellee was sound, the careful and elaborate scheme devised for selecting juries would be nullified, the statute would be a dead letter, and no inquiry could be made into the manner in which jurors

were originally chosen, if those selected to try the particular case possessed the statutory qualifications and were personally satisfactory. The Legislature, in obedience to a popular demand that a radical change be made in the manner of selecting juries, after long delay and much discussion, enacted the statute now in force; and this court in more than one case has given to this law the sanction of its approval and declared that its efficiency shall not be impaired or destroyed by the failure of public officers to observe its requirements.

Thus, in *Curtis v. Com.*, 23 Ky. Law Rep. 267, 62 S. W. 886, a motion was made to discharge the entire panel of petit jurors, because the names of the jurors were not drawn from the jury wheel as they should have been, but were selected from a list regularly summoned in a previous month. This being a criminal case, this court had no power to review the action of the trial court in overruling the challenge to the array, but in the course of the opinion said: "These men so selected may have been, and doubtless were, of the very best citizenship in the county; but they were not drawn impartially from the body of legally qualified jurymen of the county. The mode provided by law for the selection of qualified and impartial jurymen was ignored, and the jury were selected by the judge of the circuit court himself. This was clearly erroneous. He may have done this with the very best of motive, but it was not the method provided by law, and should not have been done." In *Covington & Cincinnati Bridge Co. v. Smith*, 25 Ky. Law Rep. 2292, 88 S. W. 440, in discussing this jury law, the court said: "The statutes quoted provide an elaborate system for the selection monthly in courts of continuous session of impartial jurymen fresh from the body of the people. If these provisions are enforced, each litigant is guaranteed that the best effort possible has been made to secure for the trial of his case an impartial jury. It is not believed that the requirements in the statute in regard to the selection of juries would have been set forth with such minute particularity and detail, if it had been intended that the court might nullify the manifest intention of the Legislature by ignoring them." In *Risner v. Com.*, 95 Ky. 539, 26 S. W. 388, 16 Ky. Law Rep. 84, the jury commissioners did not put in the wheel the number of names

required, and the court said: "While it is not made to directly or certainly appear that appellant was thereby substantially prejudiced, still he had the right to insist upon being tried by only a jury obtained according to the statute, which was passed for the purpose of securing fair and impartial jurors; and, to more effectually accomplish that end, the names of at least 200 persons should have been placed in the drum or wheel case. This provision cannot be disregarded in any substantial particular without defeating one of the principal purposes of the statute." *Central Kentucky Asylum for the Insane v. Hauns*, 21 Ky. Law Rep. 22, 50 S. W. 978, to which our attention is called by counsel for appellee, is not in point; nor is it in conflict with the authorities cited. There the objection to the manner in which the jury was selected was not made until after the trial was completed, and hence came too late to be available.

If the methods avowed to have been adopted in this case by the commissioners are upheld, all the safeguards thrown around the selection of juries will be virtually abolished, and the effort of the legislative department to improve and elevate the jury system a failure. The juries are almost entirely composed of men selected by the commissioners, and this power confided to them cannot be delegated in whole or in part to others. No minor officers connected with the administration of justice have more important duties to perform than do the jury commissioners. Upon their judgment and discretion in the selection of intelligent, sober, discreet, and impartial citizens and housekeepers of the county depends in a large measure the pure and impartial administration of justice in the conduct of jury trials, and this valuable privilege ought not and will not be frittered away merely because delay or inconvenience to the court or litigants may result from sustaining a challenge to the array because of substantial irregularity in the selection of the juries. It is infinitely better that there should be some delay in the trial of cases or inconvenience suffered by individuals than that a statute intended to safeguard the rights of all litigants should be totally disregarded. If the mistake or irregularity was a minor one, we would not regard it as material; but, if the avowals made are true, the statute was violated in several substan-

tial particulars. The provisions disregarded are not directory, but mandatory. They constitute the very substance and life of the law, and may not lightly be ignored or disobeyed. No fraud or improper purpose can be imputed to these commissioners, nor is it necessary that it should be. Doubtless they acted in good faith, but nevertheless in open disobedience of the law under which they were selected, and their conduct can neither be overlooked nor approved.

* * * * *

For the error mentioned, the judgment must be reversed; * * *

ULLMAN V. STATE.

Supreme Court of Wisconsin. 1905.

124 Wisconsin, 602.

Plaintiff in error was duly informed against as having on the 3rd day of August, 1902, at Dodge County, Wisconsin, made an assault on Ida Ullman with a loaded revolver with intent her, the said Ida Ullman, to kill and murder. In due time and form he entered a plea of not guilty, and was tried in October, 1903, in the circuit court for Dodge county.

* * * * *

MARSHALL, J. Before the impaneling the jury for the trial was commenced, counsel for the accused said he desired to "file a challenge to the array of jurors," accompanying such statement by presenting a paper in that regard, which was placed on file. Such paper was not incorporated into the bill of exceptions, neither does the bill show in any formal way the grounds of the challenge. The proceedings had in respect to the matter show pretty clearly what such grounds were. The point is made by the attorney general that such a challenge must be made in writing, stating specifically the grounds thereof, and that the writing must be embodied in the bill of exceptions in order to enable this court to review the decision of the trial court in respect thereto. If that be correct, whether the decision over-

ruling the challenge to the array was proper or not, is not before us.

At common law a challenge to the array was required to be made in writing, stating specifically the grounds relied on. An issue of law or fact was then formed in respect thereto, which was tried by the court, if one of law, and by triers appointed by the court, if of fact. Under our statutory system for selecting and returning jurors there is no challenge to the array in the strict common-law sense. The Code was designed to be as complete for the trial of criminal as for the trial of civil cases. It makes no provision for a challenge to the array, or for any equivalent proceeding. One is liable to fall into confusion in respect to the matter by failing to note the fact that most of the decisions in this country in Code states, where it is said that a challenge to the array must be in writing, are based on statutory requirements. In Iowa, where there is an express provision for a challenge to the entire panel, it is said that the common-law challenge to the array does not exist. *State v. Davis*, 41 Iowa, 311. It is said in cases decided in New York, California, Texas, Michigan, Minnesota, Mississippi, and other states that might be mentioned, that a challenge to the array must be in writing, but it will be found on investigation that such decisions merely follow statutory requirements. The ancient method of trying issues of fact raised on such challenge is obsolete. All issues, whether of law or fact, on an objection to the entire panel of jurors are now triable summarily by the court, whether the making of the challenge is regulated by statute or is a mere matter of practice regulated by the court. Trial courts have inherent authority, and it is their duty, to permit and give consideration to objections seasonably and properly made to the entire panel of jurors, based upon grounds specifically stated, which, if true, indicate that the statutory method of selecting jurors was prejudicially departed from. The motion or objection may properly be, as it commonly has been in this state under the Code, called a challenge to the array. *State v. Cameron*, 2 Pin. 490; *Conkey v. Northern Bank*, 6 Wis. 447; *Perry v. State*, 9 Wis. 19. But that does not imply that it must be regarded as having all the common law characteristics. It has only such of them as are appropriate to our judicial system. It

is said in 12 Ency. Pl. & Pr. 426: "At common law a challenge to the array was required to be in writing, and where this requirement has not been abrogated by statute the rule of the common law is still in force," citing authorities from seven states, in each of which, however, the matter is regulated by statute.

There is neither any statute nor rule of court nor decisions in this state regulating definitely the practice as to objecting to the entire panel of jurors. The right to make such an objection, however, has always been recognized, and exists by well established practice. It makes no very great difference how the question of the validity of the panel is raised so long as the grounds thereof are brought definitely to the attention of the court. It may be in the form of an objection to the entire panel, or a motion to quash the return thereof, or be made in the set phrase of a challenge to the array. Mere form is of little consequence when not necessary by statute. The spirit of the Code, generally speaking, is that the substance of things only is material. If it were the practice to make the objection only in writing and to denominate it by any particular name, and the trial court were to permit a violation thereof and entertain the matter nevertheless, unless it appeared that the adverse party was prejudiced thereby the error would be regarded as harmless under sec. 2829, Stats. 1898.

While it is good practice to make a challenge to the array, so called, in writing, since there is no statute requiring it to be so made, and a stenographer is now a part of the regular machinery of a trial court, who is expected to take down accurately everything that occurs in the course of a trial, the reason, in the main, for the common-law rule as to the manner of presenting the challenge, no longer exists. It should therefore be deemed entirely sufficient if the challenge is stated definitely at the bar of the court and taken down by the stenographer.

It was early held here in harmony with the common-law rule that the grounds of a challenge to the array should be specifically stated. *Conkey v. Northern Bank*, 6 Wis. 447. That should be regarded as the settled practice. Though the trial court has some discretion as to how specifically the grounds of challenge must be stated, the statement should be sufficiently full and definite to inform the trial

court and the adverse party reasonably of the precise departures from the legal requirements relied upon. The right of challenge should be exercised before commencing to impanel the jury, otherwise it should be deemed waived. 12 Ency. Pl. & Pr. 424. No departure from that rule is permissible except for extraordinary reasons.

In this case the practice as to the time of making the objection, motion, or challenge and the manner thereof, except in that the specific grounds relied on do not appear in the bill of exceptions, the writing in respect thereto being absent therefrom, was proper. The practice of the court also in treating the grounds assigned for the challenge, not admitted by the adverse party, as at issue and summarily trying the issues, was proper. Since such grounds were not formerly stated, taken down by the stenographer, and preserved in the bill, and the writing filed was not so preserved we might properly omit consideration thereof. However, since it appears that the questions raised by the challenge were fully tried and the grounds with reasonable clearness appear from the evidence, we have concluded to treat the matter.

The evidence taken upon the trial of the issues involved in the challenge indicates that the grounds relied on were as follows: First, whereas the statute provides that the jury commissioners shall furnish the clerk of the circuit court one list of names of persons qualified to serve as jurors, to be drawn from the body of the county, each commissioner proposed and furnished a partial list, and such lists were treated as satisfying the statute. Second, the commissioners did not furnish the clerk of the circuit court a complete list of names verified or certified in proper form. Third, the clerk did not make a copy of the lists filed and deliver the same to the commissioners or any one of them. Fourth, the names furnished to the clerk as aforesaid were not written upon separate slips of paper, and the slips folded and put into a box by the clerk or his deputy, as the law requires. The facts appear to be these: Each commissioner made a list and submitted it to the three for consideration. They approved of such three lists, which in the aggregate included the requisite names, as the one list which the statute required, and delivered the same to the clerk of the circuit court. Such clerk did not make

a copy of the lists so furnished and deliver the same to at least one of the commissioners, as the law requires, but each of the commissioners, to the knowledge of the clerk, preserved a copy of the list proposed by him. The law does not require the commissioners to make any verification or formal certification of the list furnished to the clerk. While neither the clerk nor his deputy wrote the names of the persons appearing upon the lists furnished, as aforesaid, on separate slips of paper, and it is not certain that either one of them folded the slips after the names were written thereon, and placed the same in a box in the presence of the commissioners, as the law requires, the names were so written by a person acting under the direction of the clerk in his presence and in the presence of the deputy and the commissioners, and the slips were then by the direction of the clerk, in his presence and in the presence of the commissioners, either by the deputy clerk or the person who wrote the names, placed in the box. The names so written upon slips of paper and put in the box were the identical names on the list furnished by the commissioners. There is an entire absence in the record of any showing of prejudicial departure from the letter of the statute. The mere fact that each commissioner proposed a list of names for a part of the entire list to be agreed upon, and the several partial lists were approved and in that form handed to the clerk, instead of the three lists being transferred to one and in that form delivered, is of no consequence whatever. The fact that the physical acts of writing the names on slips of paper and folding such slips ready for the box and putting them therein, if such be the fact, in the whole, is likewise of no consequence, since it appears that such person acted under the immediate direction of the clerk, in his presence and in the presence of the commissioners, and there is not only no indication that there was any prejudicial departure from the statute in the matter, but there is conclusive affirmative evidence to the contrary. The general rule as to irregularities in executing the statutory method for selecting jurors is that they are to be deemed immaterial, unless it appears probable that the person seeking to take advantage thereof may be prejudiced thereby. Proffatt, Jury Trial, Sec. 154; Thompson & Merriam, Juries, Sec. 134; 12 Ency. Pl & Pr. 277.

The point is made by the attorney general that in any case the challenge to the array was waived by the failure to object to the jury as a whole, reliance being placed on *Jackson v. State*, 91 Wis. 253, 267, 64 N. W. 838. The rule invoked has never been, and it seems cannot reasonably be, applied to objection to the entire panel of jurors. It only goes to objections to individual jurors. When an exception is once properly saved to a ruling on an objection to the entire panel of jurors it will be available upon a subsequent review of the final result without further calling the matter to the attention of the trial court.

* * * * *

By the Court.—Judgment is affirmed.

SECTION 4. QUALIFICATIONS OF JURORS.

KUMLI V. SOUTHERN PACIFIC COMPANY.

Supreme Court of Oregon. 1892.

21 Oregon, 505.

BEAN, J.—This is an action to recover damages for injuries alleged to have been received by plaintiff while a passenger on one of defendant's passenger trains which was wrecked by the falling of the bridge or trestlework across the marsh known as Lake Labish, in Marion county, in November, 1890. The trial resulted in a verdict and judgment in favor of plaintiff for the sum of fifteen hundred dollars, from which defendant appeals, assigning as error the action of the court in overruling its challenge for actual bias, to the jurors Kennedy, Harriott, Cooley, and Iler, and in refusing to set aside the verdict of the jury, because it is so excessive, and so disproportionate to the amount of plaintiff's injury as to indicate passion or prejudice on the part of the jury. These assignments of error will be noticed in the order indicated.

1. As to the overruling of the challenge to the jurors: It is unnecessary to state the facts, as disclosed by the examination of any of the jurors, or their *voir dire*, except the

juror Iler, whose examination presents as strong a case for the defendant as any in the record. The juror Iler, in his examination in chief by defendant's counsel, said that he did not know the plaintiff; had heard nothing about this case; had heard considerable talk about the wreck; read of it in the newspapers, and heard persons talk about it who claimed to have looked at and examined the wreck; from what he had heard the persons say who had examined the wreck, and what he saw in the newspapers, he had formed and expressed an opinion as to whether or not the railroad company was to blame for the wreck; he had that opinion then; did not know that it was a particularly fixed opinion; it is one that would require some evidence to remove. He could not say how many persons he had heard talk about the wreck, who had examined and looked at it, but supposed, perhaps, a half dozen; they said what they supposed caused the wreck; they were persons whom he had respect for. From what they said, and what he had read in the newspapers, he had formed an opinion as to the cause of the wreck; he had heard the various theories put forth through the newspapers, as to whether the wreck was caused by a defective structure, or by a rail being removed from the track by some evil-disposed person. At the conclusion of his examination by counsel, the juror, in response to questions by the court, said that what he had heard about the transaction was not from any of the witnesses in the case, but just from persons who had gone to view the wreck; that no opinion he had formed would influence his judgment in the trial of the case, but he should try the case impartially, according to the law and the evidence; that he could disregard what he had heard about the wreck, and would be governed by the evidence altogether; would not regard what he had heard, as it was only hearsay; would pay no attention to what he had been told, but would simply be guided by the testimony given in court. The challenge was thereupon overruled by the court, defendant excepting.

There is much conflict in the adjudged cases as to when an opinion touching the merits of the particular case will disqualify a person called as a juror. The standard of Lord MANSFIELD, in *Mylock v. Saladine*, 1 W. Bl. 480, that "a juror should be as white as paper, and know neither plaintiff or defendant, but judge of the issue merely as an ab-

stract proposition upon the evidence produced before him," has long since been discarded as impracticable. The courts are agreed, that with the present popular intelligence and wide dissemination of current events, through the medium of the press, a juror's mind cannot reasonably be expected to be "as white as paper," and it is no longer regarded as an objection, *per se*, to a person called as a juror, that he has heard of the particular case, or even formed or expressed an opinion touching the merits thereof.

"Were it possible," said Mr. Chief Justice MARSHALL, "to obtain a jury without any prepossessions whatever, respecting the guilt or innocence of the accused, it would be extremely desirable to obtain such a jury; but this is perhaps, impossible, and therefore not required. The opinion which has been avowed by the court is, that light impressions, which may fairly be supposed to yield to the testimony that may be offered, which may leave the mind open to a fair objection to a juror; but that those strong and deep impressions which will close the mind against the testimony that may be offered in opposition to them, which will combat that testimony and resist its force, do constitute a sufficient objection to him." (Trial of Aaron Burr, Vol. 1, 416; 1 Thomps. Trials, sec. 79.)

The rule laid down by this distinguished jurist in a trial which at the time attracted universal attention, has become substantially the settled law of this country, and it is now generally considered that if the juror's opinion will readily yield to the evidence presented in the case, he is not incompetent to sit upon the trial of the issue.

As to when the opinion is of such a character, that it will not readily yield to the evidence produced, the law in this country is in such a state of confusion, that no success can be hoped for in reconciling conflicting opinions, or arraying the decisions in logical order. Expressed in the varying terms of judicial utterances, the opinion or impression concerning the merits of the cause on trial, which disqualifies a person called as a juror, must be a "fixed," "absolute," "positive," "definite," "decided," "substantial," "deliberate," "unconditional" opinion. The rule is almost universally laid down by these words, or words of similar import. A "conditional," "hypothetical," "contingent," "in-

determinate," "floating," "indefinite," "uncertain" opinion will not do. (*Schoeffler v. State*, 3 Wis. *823; *People v. Bodine*, 1 Denio 281; *Staup v. Com.*, 74 Penn. St. 458; *Willis v. State*, 12 Ga. 444; *Osiander v. Com.*, 3 Leigh 780, 24 Am. Dec. 693; *People v. Stout*, 4 Parker Crim. Rep. 71; 1 Thomps. Trials, sec. 78.) These terms convey one and the same meaning, and, in substance, require that in order to disqualify a juror, his opinion touching the merits of the case on trial must be of a fixed and determinate character, deliberately formed and still entertained; one that in an undue measure shuts out a different belief. An opinion or impression formed from rumor, newspaper reports, or casual conversation with others, which the juror feels conscious he can dismiss, and so unsubstantial that contradiction from the same source would be as readily accepted as true, as the original statements upon which the impression or opinion was formed, constitute, ordinarily, no sufficient objection to him.

"The opinion or judgment," says Chief Justice SHAW, "must be something more than a vague impression, formed from casual conversation with others, or from reading imperfect, abbreviated newspaper reports. It must be such an opinion, upon the merits of the question, as would be likely to bias or prevent a candid judgment upon a full hearing of the evidence. If one had formed, what in some sense might be called an opinion, but which yet fell far short of exciting any bias or prejudice, he might conscientiously discharge his duty as a juror." (*Comw. v. Webster*, 5 Cush. 297; 52 Am. Dec. 711.)

While the rule is generally recognized, that the disqualifying opinion of a juror must be of a fixed and determined character, its application is frequently a matter of great nicety, and the courts have struggled, apparently in vain, to establish some judicial test, by which the question can be determined. In order to avoid the uncertainty in the decisions, as well as the supposed inflexible rules of law, by which the courts were driven, in many instances, to the illiterate and hopelessly ignorant portions of the community for jurors, the legislature of this, as well as many other states, has enacted a statute by which the competency of a person, called as a juror, shall be determined, on the trial of a chal-

lenge, for having an opinion touching the merits of the particular case.

By section 187, Hill's Code, it is provided, that on the trial of a challenge for actual bias, "although it should appear that the juror challenged has formed or expressed an opinion upon the merits of the cause from what he may have heard or read, such opinion shall not of itself be sufficient to sustain the challenge, but the court must be satisfied from all the circumstances that the juror cannot disregard such opinion, and try the issue impartially." This statute is but a recognition of the fact that, at the present day, when newspapers, railroads, and telegraphs have made intercommunication easy, and when the important transactions of today in all their details are published to the world tomorrow, the advance of popular intelligence and wide dissemination of knowledge of current events, have under the former rules of law, rendered it impossible to secure a jury of intelligent men for the trial of causes which have excited much public attention and have resulted in the necessity of trying such cases before juries composed of the illiterate and ignorant. Statutes of this character have been held not unconstitutional as invading the right of trial by jury. (*Stokes v. People*, 53 N. Y. 164; 13 Am. Rep. 492; *Jones v. People*, 2 Colo. 351; *Cooper v. State*, 16 Ohio St. 328.)

This statute does not deny the principle, which has its foundation in natural justice as well as law, that jurors should be impartial and free from any existing bias which may influence their judgment. But it assumes, and we think correctly, that a man may be a fair and impartial juror, although he have an opinion touching the merits of the cause on trial, and that he may, notwithstanding, be able to set aside and disregard such opinion and decide the case from the evidence independently thereof and uninfluenced thereby. We think human experience teaches that it may not unfrequently happen that persons who have formed an opinion touching the merits of a cause from reports verbal or written, may, as jurors, lay aside their prepossessions, and not only honestly and conscientiously endeavor, but in fact be able to hear and decide the case upon the evidence, uninfluenced by such prepossessions. Whether a person called as a juror can do so or not depends largely upon his

general intelligence, manner, tone, appearance, personal peculiarities, and sources of information from which his opinion is formed, its strength, the fact whether he exhibits any pride of opinion which may lead him to give too little or too much weight to the testimony for or against either party, and many other circumstances, difficult if not impossible to suggest. The determination of his competency, therefore, necessarily becomes primarily a question for the trial court, keeping ever in view, as it should, that the ultimate object to be attained is a trial before a fair and impartial jury. The question is wisely left largely to the sound discretion of that court, and its findings upon a challenge to a juror for actual bias, where there is any reasonable question as to his competency, ought not to be reviewed by an appellate court unless it clearly appear that such discretion has been arbitrarily exercised. (*State v. Tom*, 8 Or. 177; *State v. Saunders*, 14 Or. 300.)

It is ordinarily more safe and just to the juror and the cause of truth, to trust to the impression made upon the trial court, which heard his testimony, and noticed his manner and appearance while under examination, subject to the scrutiny of counsel, than to any written or reported statement of his testimony. His tone, temperament, and personal peculiarities, as exhibited on his examination, and which do not appear in the written report of his testimony, are important factors in determining his competency as a juror. If a person called as a juror on his examination, opinion in the case, on the merits, and nothing further is shown, the court ought, as a matter of law, to reject him as incompetent. Such a juror necessarily does not stand indifferent between the parties, and it matters little from what source he received the information upon which his opinion is based. If, however, he has no fixed belief or prejudice, and is able to say he can fairly try the case on the evidence, freed from the influence of such opinion or impression, his competency becomes a question for the trial court, in the exercise of a sound discretion, and its findings ought not to be set aside by an appellate court unless the error is manifest. "No less stringent rules," says Mr. Justice WAITE, "should be applied by the reviewing court in such a case than those which govern in the consideration of motions for new trial because the verdict is against the

evidence. It must be made clearly to appear that upon the evidence the court ought to have found the juror had formed such an opinion that he could not in law be deemed impartial. The case must be one in which it is manifest the law left nothing to the conscience or discretion of the court." (*Reynolds v. U .S.*, 98 U. S. 156.)

In the case before us, we think the challenges to the jurors were each properly overruled. Such opinions as they had were formed from newspaper reports and casual conversations with persons who had visited the wreck. They evidently had no prejudice against the defendant, and had taken no particular interest in the case. It is apparent that they had nothing but loose, floating, hesitating opinions; and as far as we can see, there was no such prejudgment of the case as would prevent them from sitting as fair and impartial jurors. The language of their examination is qualified and considerate, and is not that of positive men, hasty to judge and prompt to condemn, but rather that of honest, careful conscientious men, fair, open, and candid, with an obvious purpose to conceal nothing and suppress nothing. They each was conscious that they could disregard all they had heard about the case, and try it on the evidence as produced, uninfluenced by any opinion or impression they then had. We cannot think this is such a manifestation of partiality or prejudice as left nothing to the conscience or discretion of the trial court.

* * * * *

The judgment is affirmed.

THEOBALD V. ST. LOUIS TRANSIT COMPANY.

Supreme Court of Missouri. 1905.

191 Missouri, 395.

MARSHALL, J.—This is an action for \$5,000 damages arising from the death of the plaintiff's nineteen year old son, about six o'clock in the afternoon on the 20th of January, 1903, caused by one of the defendant's cars colliding with the rear of a wagon driven by the deceased, at a point sev-

enty to one hundred fifty feet west of Union avenue on De Giverville avenue, in the city of St. Louis. There was a verdict and judgment for the plaintiff for \$5,000, and the defendant appealed.

* * * * *

I.

The first error assigned is the ruling of the trial court in overruling the challenge for cause of the jurors Hartman and Bensberg.

Briefly stated the facts developed upon the *voir dire* were, that eight or nine years before the trial the juror Hartman had been thrown off of a car. He stated that that fact would influence him in the trial of this cause. He also stated that he would be governed by the testimony and instructions of the court, and believed that he could render an impartial verdict; that he had nothing against this defendant, but that he had during all those years entertained a prejudice against street car companies, and that that prejudice existed when he was first examined as to his qualifications for a juror, but that during the examination, that prejudice had been removed, and that he had reached the conclusion within the last five minutes that he could try this case impartially.

The juror Bensberg testified that he had a sort of a prejudice against the company, and that he did not think it would influence his verdict as a juror, yet added, "But still a person having a prejudice, that would probably unconsciously bias his opinion." And further added: "I would give more preference to the testimony of a non-employee of the company than I would an employee." Upon the court's suggestion that he meant thereby that he would consider the interest of the employee in determining the credibility of his evidence, the juror acceded to that view. After examination by the court and counsel, the juror was asked: "Q. Well, really, Mr. Juror, I do not understand your position now. That is the reason I am asking these questions. A. Well, as I said before, I have a prejudice against the company to start with. Q. You still have that prejudice? A. Still have it. Q. And you also have a prejudice against the testimony of employees. A. I would not give it the same preference that I would the evidence

of a person who was not an interested party on either side—more so an employee of the company.”

Under our system of jurisprudence there is no feature of a trial more important and more necessary to the pure and just administration of the law than that every litigant shall be accorded a fair trial before a jury of his countrymen, who enter upon the trial totally disinterested and wholly unprejudiced. Where a juror admits, as Hartman did, that he had a prejudice against street car companies of eight or ten years standing, and that that prejudice existed up to the time he gave his first answer upon his *voir dire*, yet after being examined and cross-examined by counsel and the court, and being put in the position of having to say he would allow that prejudice to overcome the obligation of his oath as a juror, or on the other hand to say that he could divest his mind of such a prejudice and fairly try a case, and that the prejudice had become dissipated within the last five minutes, it can scarcely be reasonably said that such a juror fills the requirements of our system of jurisprudence.

The juror Bensberg more candidly and accurately stated the conditions existing in such cases when he said: “Well, a person having a prejudice, that would probably unconsciously bias his opinion.” The truth of this statement is self-evident. The question of the qualification of a juror is a question to be decided by the court, and not one to be decided by a juror himself. It is the prerogative and duty of the trial court to exercise a wise, judicial discretion in this regard, and the conclusion of the court should rest upon the facts stated by the juror with reference to his state of mind, and should not be allowed to depend upon the conclusions of the juror as to whether or not he could or would divest himself of a prejudice he admitted existed in his mind. And this is true whether the prejudice exists against either of the parties or against the character of the subject-matter in litigation, or against either of the parties as a class, and not against the party as an individual. It is proper to examine a juror as to the nature, character and cause of his prejudice or bias, but it is not proper to permit the juror, who admits the existence in his mind of such prejudice or bias, to determine whether or not he can or cannot, under his oath, render an impartial verdict. Such

a course permits the juror to be the judge of his qualifications instead of requiring the court to pass upon them as questions of fact.

It is altogether a mistaken idea that the ruling of the trial court on such questions is conclusive and not subject to review. In some cases it has been loosely said that the ruling of the court on such questions is like the ruling of the trial court in law cases, and that where there is any evidence to support the ruling, an appellate court will not review the same. Such questions generally arise only in cases at law. It is the discretion exercised by the trial judge which is the subject of review. In approaching the decision of that question an appellate court is always guided by the same rule that obtains with reference to the review of discretionary judicial acts of inferior tribunals. Great deference is paid to the finding of a trial judge, but that finding is not conclusive, and where the facts are, as here, practically undisputed, such ruling is subject to review on appeal. Otherwise the whole power and authority as to the selection of jurors would be vested in the trial court, and it is against the policy of our law to permit any ruling in *nisi prius* court to be beyond review and correction by an appellate court. Accorded such a power, all else would be a foregone conclusion, and a litigant would be entirely at the mercy of the trial judge, and the usefulness and propriety of appellate courts, would, to a large extent, be diminished.

This matter has been the subject of much consideration and adjudication, not only in this State but in sister states, and text writers have undertaken to formulate rules which should be observed in the determination of the question. An examination of cases cited in the briefs of counsel, shows a vast contrariety of opinion and ruling in cases of this character.

* * * * *

Counsel for plaintiff refer to Thompson in his work on Trials, section 100, where it is said: "Under modern practice the court acts as trier of all challenges. And the determination of questions of fact is final and not subject to review." Of this it is sufficient to say that such is not the rule in this State.

Counsel for plaintiff further refer to Thompson on Trials, section 115, where the doctrine is laid down as follows:

“The sound and prevailing view is that a party cannot, on error or appeal, complain of a ruling of a trial court in overruling his challenge for cause, if it appear that, when the jury is completed, his peremptory challenges were not exhausted; since he might have excluded the obnoxious juror by a peremptory challenge, and therefore the error is to be deemed error without injury. For the same reason, if a court erroneously overrules a challenge for cause, and thereafter the challenging party excludes the obnoxious juror by a peremptory challenge, he cannot assign the ruling of the court for error, unless it appear that, before the jury was sworn, his quiver of peremptory challenges was exhausted; in which case there is room for the inference that the erroneous ruling of the court may have resulted in leaving upon the panel other obnoxious jurors whom the party might, but for the ruling, have excluded by peremptory challenge. Some courts, therefore, hold that it is enough, in such a juncture, to show that his peremptory challenges were exhausted before the jury was sworn. But others take what seems the better view, that it must also appear, not only that his peremptory challenges were exhausted, but that some objectionable person took his place on the jury, who otherwise would have been excluded by a peremptory challenge.”

Counsel for plaintiff cite cases which hold that even where the trial court erred in overruling a challenge for cause it must affirmatively appear by the record that the party had exhausted his peremptory challenges in order to successfully challenge the ruling of the court.

This doctrine is manifestly pregnant with difficulty, and would necessitate an extensive collateral inquiry precedent to the regular proceedings in a case, in order that it might appear that the aggrieved party had or had not exhausted his peremptory challenges, or had not been driven to the necessity of using some of his peremptory challenges to get rid of the alleged prejudiced juror, whom he had challenged for cause, and thereby been deprived of the opportunity of getting rid of other objectionable jurors, though less objectionable than the juror challenged for cause. Such a ruling imposes a burden upon the party aggrieved, which he ought not to be compelled to bear, and reverses the theory of our system of jurisprudence that error is prejudicial,

unless the party in whose favor the error is committed, shows that it was harmless error. The rule stated by Thompson on Trials reverses this practice and imposes upon the party who points out and assigns the error, the further burden of showing affirmatively that he was prejudiced by the error. Under our statute each party is absolutely entitled to three peremptory challenges. The statute also gives parties litigant the right to challenge a juror for cause. If error appears in the ruling of the court on a challenge for cause that question should be decided wholly independent of any consideration of whether the party litigant had or had not exhausted his peremptory challenges. In other words, the statute provides for two classes of challenges, one for cause and the other peremptorily without assigning any cause. And in the determination of the question of the propriety of the ruling upon a challenge for cause, it is improper to mix with it a consideration of the question as to whether or not the complaining party had exhausted his peremptory challenges.

* * * * *

The conclusion is irresistible that the trial court should have sustained the challenge for cause.

* * * * *

For the foregoing reasons the judgment of the circuit court is reversed.

BRACE, P. J., concurs; VALLIANT and LAMM, J. J., concur in paragraphs 1 and 2, and in the result.

WILSON V. WAPELLO COUNTY.

Supreme Court of Iowa. 1905.

129 Iowa, 77.

Action at law to recover damages growing out of the death of W. M. Wilson, plaintiff's intestate, and which death was occasioned, as alleged, by the negligence of the defendant county in permitting a county bridge to remain in a defective and dangerous condition. Upon trial there was

a verdict and judgment in favor of defendant, and the plaintiff appeals.—*Affirmed.*

* * * * *

BISHOP, J.—I. This action was commenced in January, 1903, and was reached for trial upon the issues joined in December, 1904. As the jury was being impaneled, the plaintiff challenged for cause each of the individual jurors called into the box who made answer that he was a property owner and tax payer in the county. The ground of challenge was that the juror was "incompetent because of showing such a state of mind as would preclude him from rendering a just verdict in said cause." The several challenges were overruled, and, after exhausting her right of peremptory challenge, the plaintiff was compelled to go to trial before a jury made up of taxpayers of the county. Out of this situation arises the error first complained of. The statute enumerates the several grounds upon which a challenge for cause to an individual juror may be laid. Among these, and it is the only one having any pertinency to the present inquiry, is the following: "When it appears the juror * * * shows such a state of mind as will preclude him from rendering a just verdict." Code, section 3688, subd. 9.

It must be apparent that a challenge based upon such ground calls only for a conclusion upon a fact question, and of necessity such question is addressed to the sound discretion of the trial court. And, as in other cases, where an exercise of discretion is under review, we may not interfere, except an abuse be made to appear. *Anson v. Dwight*, 18 Iowa, 241; *Sprague v. Atlee*, 81 Iowa, 1; *Goldthorp v. Goldthorp*, 115 Iowa, 430.

Now it may very well be considered that a personal pecuniary interest in the result of an action is of itself sufficient to justify a finding that a state of mind exists such as to preclude a just verdict. And without doubt every taxpayer within the limits of a municipal corporation is interested in a pecuniary sense in the result of an action brought against such corporation to recover damages as for a personal injury. He must contribute in the way of payment of taxes to liquidate any judgment that may be obtained. It is in line with this thought that we have uniformly held that in actions against a city or town for the recovery of money there was no abuse of discretion in sustaining a

challenge for cause to a juror; the challenge being predicated wholly upon the fact that the juror was a taxpayer of the defendant city or town. Of such cases are these: *Davenport, etc., Co. v. Davenport*, 13 Iowa, 229; *Dively v. Cedar Falls*, 21 Iowa 567; *Cramer v. Burlington*, 42 Iowa 315; *Cason v. Ottumwa*, 102 Iowa 99.

Some language is used in the opinion in the *Cramer* Case, and likewise in the *Cason* Case, upon which an argument might be based, to the effect that it would be reversible error to overrule a challenge made to a taxpayer called as a juror in such a case, but respecting such matter we need not make any pronouncement at this time. It is sufficient to remark in this connection that jurors are drawn from the county at large, and where a city, town, or other minor municipality is proceeded against no substantial injustice could result from a trial to a jury made up of non-taxpaying members of the panel. Moreover, no difficulty need be apprehended in such cases, as challenges on the ground of interest, if sustained, could not have the effect of blocking the machinery of the court, and thus make it impossible that a case be put upon trial. When, however, a county is proceeded against, the court is confronted with quite a different situation. While there is no requirement in the statute that one must be a taxpayer to be eligible as a juror, yet it is fair to presume that each person drawn for jury service is the owner of some property, greater or less in amount or value, which is the subject of taxation. Indeed, we think it within common experience in this State that the appearance of a non-taxpaying juror furnishes a rare exception to the rule. And it is hardly conceivable that a panel should be drawn in any county presenting a sufficient number of non-taxpaying members to make it possible to make up a jury out of such for the trial of a case. It may be true enough that, after exhausting the regular panel, the drawing of talesmen might be resorted to and continued indefinitely until a sufficient number of jurors who could pass challenge should be found. Conceding the possibility of such a course, and to say nothing of the expense incident thereto, we should be very slow to condemn the discretionary action of a trial court in refusing to compel parties to submit their important matters of difference to a jury which might be eventually thus made up. And this conclus-

ion is the more readily reached in view of the statute which gives a plaintiff who has brought an action triable to a jury against a county, in the court of that county, as he must, the unqualified right to have the place of trial changed to an adjoining county. Code, section 3505, subd. 1.

In some of the sister States it has been provided by statute that, in an action against a county, it shall be no ground of challenge that a juror called to the box is a taxpayer of the county. And such enactments are undoubtedly based upon the thought that the extent of the personal interest of an individual taxpayer is too slight to be permitted to outweigh, not only the necessity for a speedy disposition of cases thus brought, but the desirability of having every jury made up from the substantial citizenship of the county. In other States it has been held that, in the absence of a mandatory statute, the slight financial interest which flows from the obligation to pay taxes is not sufficient to disqualify a juror, where otherwise there would be a failure of justice. *Com. v. Ryan*, 5 Mass. 90; *Com. v. Brown*, 147 Mass. 585 (18 N. E. Rep. 587, 1 L. R. A. 620, 9 Am. St. Rep. 736); *State v. Intoxicating Liquors*, 54 Me. 564; *Middletown v. Ames*, 7 Vt. 166; *Bassett v. Governor*, 11 Ga. 207.

* * * * *

We conclude that there was no error, and the judgment is affirmed.

SEARLE V. ROMAN CATHOLIC BISHOP OF SPRINGFIELD.

ROMAN CATHOLIC BISHOP OF SPRINGFIELD V. SEARLE.

Supreme Judicial Court of Massachusetts. 1999.

203 Massachusetts, 493.

TWO ACTIONS OF TORT; the first action by George Everett Searle against the Roman Catholic Bishop of Springfield, who as a corporation sole under St. 1898, c. 368, held the title to certain real estate in the town of Easthampton, which

was bought as a site for a church edifice, alleging the conversion by the defendant of a one story and a half wooden building alleged to be personal property and to be the property of the plaintiff, having been built for the plaintiff by one Charles W. Smith, with the consent of Delia A. Strong, who then was the owner of the land; and the second action by the defendant in the first case against the plaintiff in the first case and certain other persons, for damages alleged to have been caused by an attempt to remove the building from the real estate, of which it was alleged to be a part, seeking also equitable relief by way of injunction. * * * * *

KNOWLTON, C. J. The question at the trial was whether a building erected on land of the defendant in the first action, who will hereinafter be called the defendant, was personal property belonging to Searle, who will hereinafter be called the plaintiff, or was real estate owned by the defendant.

* * * * *

Exception was taken by the defendant to the ruling of the judge at the request of the plaintiff, that no person of the Roman Catholic faith should sit as a juror in these cases. Under this ruling two jurors were excluded from the panel, one a resident of Northampton and the other a resident of South Hadley. The ruling was made on the ground that the defendant is the Roman Catholic Bishop of Springfield, a corporation sole under the St. 1898, c. 368, who holds the title to the real estate in trust for the Roman Catholic church, and that these excluded jurors have an interest in the suit analogous to that which taxpayers have in a suit against the city or town in which they reside. It is not contended and it could not successfully be contended that holding the same religious belief as one of the parties, or affiliation with him in the same church, would disqualify a person from sitting as a juror in his case. The application of such a doctrine would be unjust and impracticable. *Commonwealth v. Buzzell*, 16 Pick. 153; *Purple v. Horton*, 13 Wend. 1; *Barton v. Erickson*, 14 Neb. 164; *Smith v. Sisters of Good Shepherd*, 27 Ky. Law Rep. 1170.

The real estate held by the defendant is in the town of Easthampton, and it was bought as a site for a church edi-

fice. The excluded jurors were not taxpayers in that town, and it may be assumed that they were not members of the parish that was expected to use the church. The ruling applied to all jurors of the Roman Catholic faith, without reference to their residence or to any close affiliation with the local church. Has every person of the Roman Catholic faith in the diocese of the bishop of Springfield a pecuniary interest, of which the court can take notice, in every church owned by the defendant in every part of the diocese? We are of opinion that he has not. It does not appear, and we have no reason to suppose, that every Roman Catholic living in a remote part of the diocese can be affected pecuniarily by a small loss or gain of the bishop as owner, in connection with the erection of a Roman Catholic church in Easthampton.

Under the St. 1898, c. 368, the defendant's holding of property is "for the religious and charitable purposes of the Roman Catholic Church." In the R. L. c. 36, sec. 44-46, it is strongly implied that there is a difference in the trusts, and in the beneficiaries, among churches in different places, and that the members of a particular parish and those directly connected with the church therein have different pecuniary relations to the church there from those of the same faith who live in a different part of the same diocese. Upon the record before us this ruling of the judge appears to be wrong. See *Burdine v. Grand Lodge of Alabama*, 37 Ala. 478; *Delaware Lodge v. Allmon*, 1 Penn. (Del.) 160.

The remaining question is whether the error was prejudicial to the legal rights of the defendant. The manner of impaneling jurors is prescribed by the R. L. c. 176, sec. 25. The names of those summoned as jurors are written on ballots and placed in a box, and, after the ballots are shaken up, the clerk draws them one by one in succession until twelve are drawn. Apart from challenges, "the twelve men so drawn * * * shall be the jury to try the issue," etc. The order of the judge was a violation of the statutory provision, and of the defendant's right to have the excluded men sit as jurors unless challenged by the plaintiff.

The case was tried by other qualified jurors, and it is argued that the defendant was not injured by the order. Under the R. L. c. 176, sec. 32, no irregularity in the drawing, summoning, returning or impaneling of jurors is suffic-

ient to set aside the verdict, unless the objecting party was injured thereby. In general it may be assumed that all duly qualified jurors, against whom there cannot be a successful challenge for cause, will consider and try a case properly. But a man may have affiliations and friendships or prejudices and habits of thought which would be likely to lead him to look more favorably for the plaintiff, or less favorably for him, upon a case of a particular class, or upon one brought by a particular person or a member of a particular class of persons, than would the average juror, even though his peculiarities are not sufficiently pronounced to disqualify him for service. It is in reference to these peculiarities that the parties are given a limited number of peremptory challenges. While they have no direct right of selection, this right of peremptory challenge gives to each party a restricted opportunity for choice among qualified persons. Anything which renders this statutory right of peremptory challenge materially less valuable is an injury to a party, within the meaning of the statute. We do not intimate that any juror would consciously allow feelings of friendship or prejudice, or unusual and peculiar habits of thought, to affect his conduct in the jury room; much less that a party has a right to have the benefit of the peculiar views or special feelings of a particular juror in the trial of his case. But the right of peremptory challenge in the impaneling of jurors cannot be disregarded as of no value to the parties. In the case at bar, a class of persons qualified as jurors, whom the plaintiff thought in such relations of religious affiliation with the defendant that they would be likely to hear his defense in an attitude of special friendship, was withdrawn from the list of jurors. The order of the judge rejecting these men, at the request of the plaintiff, gave him at the outset an additional power of choice, and made his right of peremptory challenge relatively more valuable, while the defendant's similar right was made relatively less valuable. We are of opinion that this was an injury to the defendant which entitles him to a new trial. The number of persons summoned as jurors that belonged to this class does not appear. It only appears that the names of two of them happened to be drawn from the box.

Our decision seems to be in accordance with the weight

of authority, although some of the cases depend upon local statutes. *Hildreth v. Troy*, 101 N. Y. 234; *Welch v. Tribune Publishing Co.*, 83 Mich. 661; *Scranton v. Gore*, 124 Penn. St. 595; *Montague v. Commonwealth*, 10 Gratt. 767; *Kunneen v. State*, 96 Ga. 406; *Bell v. State*, 115 Ala. 25; *Danzev v. State*, 126 Ala. 15.

We are aware that courts have often required pretty clear proof of injury before setting aside a verdict for a cause of this kind. *West v. Forrest*, 22 Mo. 344; *Southern Pacific Co. v. Rauh*, 49 Fed. Rep. 696; *Pittsburg, Cincinnati, Chicago & St. Louis Railroad v. Montgomery*, 152 Ind. 1, 23; *People v. Searcey*, 121 Cal. 1; *Tatum v. Young*, 1 Porter, (Ala.) 298; *Abilene v. Hendricks*, 36 Kans. 196, 200. It is also generally held that an appellate court will not review an exercise of discretion, or a mere finding of fact of a trial judge, determining whether a person shall sit upon a jury. *Commonwealth v. Hayden*, 4 Gray 18; *Grace v. Dempsey*, 75 Wis. 313; *People v. Searcey*, 121 Cal. 1, 3; *Commonwealth v. Moore*, 143 Mass. 136, and cases cited. Whether an error of law like that in the present case, if it arose only in determining the qualifications of a single juror, should be held so far to injure an objecting party as to require the verdict to be set aside, we do not find it necessary to determine; but when, as in the present case, the ruling applies to a class of persons, we feel constrained to say that there was an injury of which the law should take notice.

Exceptions sustained.

SECTION 5. QUESTIONING THE JURY.

GOFF V. KOKOMO BRASS WORKS.

Appellate Court of Indiana. 1909.

43 Indiana Appellate, 642.

MYERS, J.—Action by appellant to recover damages for personal injuries alleged to have been sustained by him while in the service of appellee. The issues were formed

by the complaint and answer of general denial. The cause was tried by a jury and a verdict returned for appellee. From a judgment in favor of appellee appellant has appealed to this court, assigning as error the overruling of his motion for a new trial.

The reasons assigned in support of the motion relate solely to the action of the court in sustaining the objections of appellee to certain questions, propounded by appellant to the persons called to act as jurors, touching their competency and qualifications so to act. These questions called for information as to whether they were acquainted with any of the officers or agents of the Travelers Insurance Company, whether any of them ever had any business relations with that company, whether they were then or ever had been the agents or in the employ of that company, or whether they were then acquainted with any agent of that company? Preliminary to these questions appellant offered to introduce evidence to the court tending to show that the Travelers Insurance Company was interested in the result of the suit, and this offer was refused. A complete examination of each of the jurors upon his *voir dire* is made a part of the record by a bill of exceptions. Appellee contends that, the jury being accepted by appellant, without making any peremptory challenge or objection to the competency of any juror, he thereby waived any error that may have been committed in impaneling the jury.

From the objections made to the various questions propounded by appellant to each of the jurors, and from the rulings of the court as disclosed by the record, it appears that the court proceeded upon the theory that, as appellee was the only defendant of record, the latitude of appellant's inquiry did not extend to elicit the suggested information.

The matter of impaneling a jury must, to a great extent, be left to the sound discretion of the trial court, and only in cases where an abuse of that discretion is clearly shown will appellate tribunals disturb the judgment of that court. Courts of last resort having to do with questions, in principle, not unlike the one here presented, with almost one accord, have held that where parties are acting in good faith considerable latitude should be allowed along lines touching the competency of persons called as jurors

to act in the matter under investigation, as also for the purpose of furnishing a basis upon which the court and parties may proceed intelligently, to the end that a fair and impartial jury may be obtained. 2 Elliott, Gen Prac., Secs. 507; *Epps v. State* (1885), 102 Ind. 539, 545; *Evansville Metal Bed Co. v. Loge* (1908), 42 Ind. App. 461; *Donovan v. People* (1891), 139 Ill. 412, 28 N. E. 964; *Shoots v. State* (1886), 108 Ind. 415; *Connors v. United States* (1895), 158 U. S. 408, 15 Sup. Ct. 951, 39 L. Ed. 1033; 24 Cyc. 341; *Stephenson v. State* (1887), 110 Ind. 358, 362, 59 Am. Rep. 216. The juror is, no less than a witness, obliged to disclose, upon his oath, true answers to such questions as may be asked touching his competency to serve as a juror in the case about to be tried (Thornton Juries and Instructions, Secs. 128; *Burt v. Panjaud* (1878), 99 U. S. 180, 25 L. Ed. 451), and the court should exclude questions which are irrelevant, and would not, however answered, affect the juror's competency in the particular case, or which would tend to mislead or confuse a juror, or would, as said in the case of *Chybowski v. Bucyrus Co.* (1906), 127 Wis. 332, 106 N. W. 833, 7 L. R. A. (N. S.) 357, clearly give "undue importance to the insurance company's connection with the case, since no such basis was necessary." *Howard v. Beldenville Lumber Co.* (1906), 129 Wis. 98, 108 N. W. 48; *Faber v. C. Reiss Coal Co.* (1905) 124 Wis. 554, 102 N. W. 1049; *Connors v. United States*, *supra*; 24 Cyc. 341.

In *M. O'Connor & Co. v. Gillaspy* (1908), 170 Ind. 428, it is said: "Parties litigant in cases of this class are entitled to a trial by a thoroughly impartial jury, and have a right to make such preliminary inquiries of the jurors as may seem reasonably necessary to show their impartiality and disinterestedness. In the exercise of this right counsel must be allowed some latitude, to be regulated in the sound discretion of the trial court, according to the nature and attendant circumstances of each particular case. The examination of jurors on their *voir dire* is not only for the purpose of exposing grounds of challenge for cause, if any exist, but also to elicit such facts as will enable counsel to exercise their right of peremptory challenge intelligently. Questions addressed to this end are not barred though directed to matters not in issue, provided they are pertinent, and made in good faith. It does not appear from

the record that an accident or indemnity insurance company was in any manner interested in this action, but the laws of this state authorize the incorporation of companies for indemnifying employers against liability for accidental injuries to employes, and it is a matter of common knowledge that numerous companies are engaged in such insurance in this State."

In the case at bar the Travelers Insurance Company was not a party to the record, and for aught that appears from the complaint was not interested in the result of the suit, but the record shows that appellant offered to introduce evidence to the court tending to show that it was present in court by hired counsel actively engaged in defending the action; and that it had issued a policy of insurance to appellee. This evidence was admissible only in the discretion of the court, and for its sole use in determining counsel's good faith in pursuing the inquiry. Therefore, meeting the question, does the record before us show an abuse of that discretion lodged with the trial court as will authorize this court to set aside the judgment? Limiting our inquiry to the particular information desired by appellant, as indicated by the questions propounded to each juror, and to which objections were sustained, it seems to us quite clear that the questions should have been answered. For, in case the insurance company was pecuniarily interested in the litigation, a person in its employ or otherwise interested in it, naturally would be more liable to be unduly influenced to grant an advantage on the side of his employer or in the protection of a private interest than one having a single purpose—returning a verdict according to the law and the evidence. In *Spoonick v. Backus-Brooks Co.* (1903), 89 Minn. 354, 358, 94 N. W. 1079, it is said: "That either litigant has the right to challenge for implied bias must, of course, be admitted, and we think it would be impossible to say, or for the court to hold in the exercise of its proper discretion, that any person connected with the indemnifying company as a stockholder or otherwise could be a proper person to sit as a juror in a case the result of which might be of pecuniary interest to such company. If the proposed juror was a stockholder or otherwise interested in such a company his disqualification would seem to follow as a matter of law. If this be so, it is difficult to see upon what

ground the court could refuse to permit counsel to ascertain the facts while impaneling the jury. It is no answer to this to say that the insurance company is not named as a party to the action, for the bias of the juror is not to be determined by this fact. Nor is it an answer to say that counsel may protect his client by using a peremptory challenge. It is his right first to learn the facts, and he must do so to exercise intelligently his right to challenge peremptorily. The authorities all go to show that a very insignificant interest in the result of an action, and frequently a very trifling relationship to one of the parties, is sufficient to disqualify a person from sitting as a juror. In order to secure to litigants unbiased and unprejudiced jurors, we are compelled to hold that plaintiff's counsel had a right to ascertain whether there was such a relationship between the persons called as jurors and the insurance company, a corporation vitally interested in the result, which would disqualify these persons, because, by implication, they would be biased and prejudged." And see *Block v. State* (1885), 100 Ind. 357; *Burnett v. Burlington, etc., R. Co.* (1884), 16 Neb. 332, 20 N. W. 280; *Ensign v. Harney* (1883), 15 Neb. 330, 18 N. W. 73, 48 Am. Rep. 344; *Martin v. Farmers, etc. Ins. Co.* (1905), 139 Mich. 148, 102 N. W. 656; *Hearn v. City of Greensburgh* (1875), 51 Ind. 119; *Terre Haute Electric Co. v. Watson* (1904), 33 Ind. App. 124; *Johnson v. Tyler* (1891), 1 Ind. App. 387; 2 Elliott, Gen. Prac. Secs. 507, 514, 515; *Beall v. Clark* (1883), 71 Ga. 818.

The weight of authority affirms the right of parties to examine persons called as jurors on their *voir dire*, as counsel sought to do in this case. He was denied that right. The information indicated by the questions does not appear in the record as having been furnished in any other manner. Whether any or all of the jurors who tried the case had any interest in the insurance company, which counsel for appellant offered to show to the court was financially interested in the result of the litigation, nowhere appears. The action of the court in refusing to permit counsel for appellant to examine the persons called as jurors along the line suggested in this opinion was error, and, in the absence of a showing that it was harmless, entitles appellant to reversal of the judgment without first showing that

some disqualified juror sat in the case. * * *

*Judgment reversed.*¹

¹*Statutory restrictions.* In some states the character and scope of the questions to be asked a juror are prescribed by statute. See *Commonwealth v. Warner*, (1899) 173 Mass 541, 54 N. E. 353; *Commonwealth v. Poisson*, (1893) 157 Mass. 510, 32 N. E. 906; *State v. Bethum*, (1910) 86 S. C. 143, 67 S. E. 466; *State v. Roberts*, (1910) (Del.) 78 Atl. 305; *Woolfolk v. State*, (1890) 85 Ga. 69, 11 S. E. 814.

SECTION 6. METHOD OF EMPANELLING.

POINTER V. UNITED STATES.

Supreme Court of United States. 1894.

151 United States, 396.

MR. JUSTICE HARLAN delivered the opinion of the court.

At the February term, 1892, of the Circuit Court of the United States for the Western District of Arkansas, the grand jury returned an indictment against John Pointer for the crime of murder.

* * * * *

The entire panel of the petit jury was called and the jurors were examined as to their qualifications, and, the journal entry states, thirty-seven in number were found to be generally qualified under the law, that is, in the words of the bill of exceptions, "qualified to sit on this case." The defendant and the government were then furnished, each, with a list of the thirty-seven jurors thus selected, that they might make their respective challenges, twenty by the defendant and five by the government, the remaining first twelve names, not challenged, to constitute the trial jury. The defendant at the time objected to this mode of selecting a jury: "1st, because it was not according to the rule prescribed by the laws of the State of Arkansas; 2d, because it was not the rule practiced by common law courts; 3d, because the defendant could not know the particular jurors before whom he would be tried until after his challenges, as guaranteed by the statutes of the United States, had been exhausted; 4th, because the government did not tender to the defendant the jury before

whom he was to be tried, but tendered seventeen men instead of twelve, and made it impossible for defendant to know who the twelve men before whom he was to be tried were until after his right to challenge was ended."

At the time this objection was made the defendant's counsel saved an exception to the mode pursued in forming the jury, and said: "The point we make is, that the government must offer us the twelve men they want to try the case." The court observed: "They offered you thirty-seven." "We understand," counsel said, "but we want to save that point."

* * * * *

The right to challenge a given number of jurors without showing cause is one of the most important of the rights secured to the accused. "The end of challenge," says Coke, "is to have an indifferent trial, and which is required by law; and to bar the party indicted of his lawful challenge is to bar him of a principal matter concerning his trial." 3 Inst. 27, c. 2. He may, if he chooses, peremptorily challenge "on his own dislike, without showing any cause;" he may exercise that right without reason or for no reason, arbitrarily and capriciously, Co. Lit. 156 b; 4 Bl. Com. 353; *Lewis v. United States*, 146 U. S. 376. Any system for the empanelling of a jury that presents or embarrasses the full, unrestricted exercise by the accused of that right, must be condemned. And, therefore, he cannot be compelled to make a peremptory challenge until he has been brought face to face, in the presence of the court, with each proposed juror, and an opportunity given for such inspection and examination of him as is required for the due administration of justice.

Were his rights in these respects impaired or their exercise embarrassed by what took place at the trial? We think not. The jurors legally summoned for service on the petit jury were, as we have seen, examined in his presence as to their qualifications, and thirty-seven were ascertained, upon such examination, to be qualified to sit in the case. Both the accused and the government had ample opportunity, as this examination progressed to have any juror who was disqualified rejected altogether for cause. A list of all those found to be qualified under the law, and not subject to challenge for cause, was furnished to the

accused and to the government, each side being required to make their challenges at the same time, and having notice from the court that the first twelve unchallenged would constitute the jury for the trial of the case. It is apparent, from the record, that the persons named in the list so furnished were all brought face to face with the prisoner before he was directed to make, and while he was making his peremptory challenges.

Was the prisoner entitled, of right, to have the government make its peremptory challenges first, that he might be informed, before making his challenges, what names had been stricken from the list by the prosecutor? In some jurisdictions it is required by statute that the challenge to the juror shall be made by the State before he is passed to the defendant for rejection or acceptance. Such is the law of Arkansas, and the court below was at liberty to pursue that method. *Mansfield's Digest*, sec. 2242. And such is regarded by some courts as the better practice, even where no particular mode of challenge is prescribed by statute. *State v. Cummings*, 5 La. Ann. 330, 332. But as no such provision is embodied in any act of Congress, it was not bound by any settled rule of criminal law to pursue the particular method required by the local law. The uniform practice in England, as appears from the observations of Mr. Justice Abbott, afterwards Lord Tenterden, in *Brandeth's Case*, 32 Howell's St. Tr. 755, was to require the accused to exercise his right of challenge before calling upon the government. He said: "Having attended, I believe, more trials of this kind than any other of the judges, I would state that the uniform practice has been that the juryman was presented to the prisoner or his counsel, that they might have a view of his person; then the officer of the court looked first to the counsel for the prisoner to know whether they wished to challenge him; he then turned to the counsel for the crown to know whether they challenged him." p. 771. In the same case, Lord Chief Baron Richards said that he conceived it to be clear that "it is according to the practice of the courts that the prisoner should first declare his resolution as to challenging." p. 774. Mr. Justice Dallas expressed his concurrence in those views. pp. 774, 775. But the general rule is, that where the subject is not

controlled by statute, the order in which peremptory challenges shall be exercised is in the discretion of the court. *Commonwealth v. Piper*, 120 Mass. 185; *Turpin v. State*, 55 Maryland, 464; *Jones v. State*, 2 Blackford, 475; *State v. Hays*, 23 Missouri, 287; *State v. Pike*, 49 N. H. 406; *State v. Shelledy*, 8 Iowa, 477, 480, 504; *State v. Boatwright*, 10 Rich. (Law), 407; *Shuflin v. State*, 20 Ohio St. 233.

In some jurisdictions the mode pursued in the challenging of jurors is for the accused and the government to make their peremptory challenges as each juror, previously ascertained to be qualified and not subject to be challenged for cause, is presented for challenge or acceptance. But it is not essential that this mode should be adopted. In *Regina v. Frost*, 9 Car. & P. 129, 137, (1839), the names of jurors were taken from the ballot-box, and each was sworn on the *voir dire* as to his qualifications before being sworn to try. When the government peremptorily challenged one who had been sworn on the *voir dire* as to his qualifications, it was objected that the challenge came too late, because the juror had taken the book into his hand to be sworn to try. In disposing of this objection Chief Justice Tindal said: "The rule is that challenges must be made as the jurors come to the book and before they are sworn. The moment the oath be begun it is too late, and the oath is begun by the juror taking the book, having been directed by the officer of the court to do so. If the juror takes the book without authority, neither party wishing to challenge is to be prejudiced thereby." These observations, it is apparent, had reference only to the question whether a peremptory challenge could be permitted after the juror had, in fact, taken the book into his hand for the purpose of being sworn to try. At most, in connection with the report of the case, they tend to show that the practice in England, as in some of the States, was to have the question of peremptory challenge as to each juror, sworn on his *voir dire* and found to be free from legal objection, determined as to him before another juror is examined as to his qualifications. But there is no suggestion by any of the judges in Frost's case that that mode was the only one that could be pursued without embarrassing the accused in the exercise of his

right of challenge. The authority of the Circuit Courts of the United States to deal with the subject of empanelling juries in criminal cases, by rules of their own, was recognized in *Lewis v. United States*, subject to the condition that such rules must be adapted to secure all the rights of the accused. 146 U. S. 379.

We cannot say that the mode pursued in the court below, although different from that prescribed by the laws of Arkansas, was in derogation of the right of peremptory challenge belonging to the accused. He was given, by the statute, the right of peremptorily challenging twenty jurors. That right was accorded to him. Being required to make all of his peremptory challenges at one time, he was entitled to have a full list of jurors upon which appeared the names of such as had been examined under the direction of the court and in his presence, and found to be qualified to sit on the case. Such a list was furnished to him, and he was at liberty to strike from it the whole number allowed by the statute, with knowledge that the first twelve on the list, not challenged by either side, would constitute the jury. And after it was ascertained, in this mode, who would constitute the trial jury, it was within the discretion of the court to permit them to be again examined before being sworn to try. But no such course was suggested, and the record discloses no reason why a further examination was necessary in order to secure an impartial jury. The right of peremptory challenge, this court said, in *United States v. Marchant*, 12 Wheat. 480, 482, and in *Hayes v. Missouri*, 120 U. S. 68, 71, is not of itself a right to select, but a right to reject, jurors.

It is true that, under the method pursued in this case, it might occur that the defendant would strike from the list the same persons stricken off by the government. But that circumstances does not change the fact that the accused was at liberty to exclude from the jury all, to the number of twenty, who, for any reason, or without reason, were objectionable to him. No injury was done if the government united with him in excluding particular persons from the jury. He was not entitled, of right, to know, in advance, what jurors would be excluded by the government in the exercise of its right of peremptory challenge. He was only entitled, of right, to strike the names of twen-

ty from the list of impartial jurymen furnished him by the court. If upon that list appeared the name of one who was subject to legal objection, the facts in respect to that juror should have been presented in such form that they could be passed upon by this court. But it does not appear that any objection of that character was made, or could have been made, to any of the thirty-seven jurors found, upon examination, to be qualified.

Thus, in our opinion, the essential right of challenge to which the defendant was entitled was fully recognized. And there is no reason to suppose that he was not tried by an impartial jury. The objection that the government should have tendered to him the twelve jurors whom it wished to try the case, or that he was entitled to know before making his challenges the names of the jurors by whom it was proposed to try him, must mean that the government should have been required to exhaust all of its peremptory challenges before he peremptorily challenged any juror. This objection is unsupported by the authorities, and cannot be sustained upon any sound principle.

* * * * *

We perceive no error in the record to the prejudice of the substantial rights of the plaintiff in error.

Judgment affirmed.

SECTION 7. CHALLENGES.

COUGHLIN V. PEOPLE.

Supreme Court of Illinois. 1893.

144 Illinois, 140, 164.

MR. CHIEF JUSTICE BAILEY delivered the opinion of the court:

* * * * *

Challenges to jurors, based upon an allegation of bias, favor or partiality, were, at the common law, divided into two classes, viz., principal challenges and challenges to the favor. A principal challenge was grounded on such mani-

fest presumption of partiality, that if the fact alleged was proved to be true, the disqualification of the juror followed as a legal conclusion, incapable of being rebutted. In case of a challenge to the favor, on the other hand, the disqualification arose as a conclusion of fact to be determined by the triers, the evidence adduced in support of the challenge leading to no presumption which might not be overcome by other evidence.

Among the various matters which, at common law, were held to be principal cause of challenge, that is, cause from which bias or partiality would be inferred as a legal conclusion, were these: consanguinity or affinity of the juror with either of the parties within the ninth degree; that the juror was god-father to the child of either party, or *e converso*; that the juror was of the same society or corporation with either party; or was tenant or "within the distress" of either party; or had an action implying malice depending between him and either party; or was master, servant, counsellor, steward or attorney for either party; or after he was returned, he ate and drank at the expense of either party; or had been chosen as arbitrator by either party. By most of the authorities it was held to be ground of principal challenge, that the juror had formed and declared his opinion touching the matter in controversy. 5 Bac. Abridg. 353; 3 Black Com. 363; 2 Tidd's Prac. 853; Coke Litt. 155; 3 Burns' Justice of the Peace (28th Ed.) 519; 21 Viner's Abridg. 252; 1 Chit. Crim. Law, 541; 3 Chit. Gen. Prac. 794; *Pringle v. Hulse*, 1 Cow. 436, note 1; *People v. Bodine*, 1 Denio, 304. According to these authorities and others like them, where the matter alleged was held to be ground for principal challenge, all the challenging party was called upon to do was, to prove the existence of the fact alleged by him as a ground of challenge, and that being shown, the incompetency of the juror followed as a necessary legal consequence, and in such case, no inquiry was permitted as to whether, notwithstanding the fact shown, he could sit as a juror and render a fair and impartial verdict. The law, from the fact proved, conclusively presumed bias, and permitted no further inquiry.

In this State, triers are not appointed, according to the mode of procedure at common law, all challenges, by our practice, being determined by the court. Nor has the com-

mon law distinction between principal challenges and challenges to the favor been kept up in this State, still many of the principles growing out of that distinction have been habitually recognized and enforced. Indeed, most of the objections to jurors which at common law were held to be ground of principal challenge, are held with us to be absolute disqualifications, that is, upon mere proof of the fact alleged, the disqualification follows as a legal conclusion, and evidence is not admitted to show that, notwithstanding the fact proved, the juror is really impartial.

* * * * *

STATE V. MYERS.

Supreme Court of Missouri. 1906.

198 Missouri, 225.

GANTT, J. * * * * *

2. It is next insisted that the court erred in overruling the defendant's challenge to the Jurors Lancaster, Golden, Cossett, Borgnier, Wharton, Miller, Soper and Capps for the reason that the said jurors on their *voir dire* examination testified that they had formed opinions as to the guilt or innocence of the defendant from having read a copy of the confession of Frank Hottman published in the Kansas City newspapers. To this assignment of error the State makes two answers: First, no specific ground of challenge was stated by the defendant to either or all of said jurors; and, second, that the jurors were not incompetent because they had formed an opinion from the reading of the newspaper report of the Hottman trial, and what purported to be Hottman's confession published in the newspapers. The record discloses that upon the close of the examination of each of the said jurors, the defendant made the general challenge, "Defendant challenged this juror;" no specific ground of challenge was given in either case. Were the challenges sufficient to preserve the error now complained of for review by this court? In *Kansas City v. Smart*, 128 Mo. 1. c. 290, it was said: "The grounds of challenge to a

juror must be stated when it is offered and tested on his *voir dire*. The trial court is entitled to know the reason for the challenge. (*State v. Brownfield*, 83 Mo. 453, 454; Thompson & Merriam on Juries, sec. 253, and cases cited; 1 Thompson on Trials, sec. 98.)” In *State v. Taylor*, 134 Mo. 142, Judge Sherwood, speaking for this court, reviewed the authorities on this point and said:

“The defendants of course, were entitled to a full and competent panel of forty men before announcing their final challenges, but in reaching this stage of the proceedings it became necessary to make what might be termed intermediary challenges. In making such preliminary challenges that is, challenges for cause, this formula was observed at the close of the examination of each venireman: ‘Counsel for defendants objected to this juror as disqualified and not qualified to sit as a competent juror in this cause, and challenged said juror for cause. Objection and challenge overruled, to which ruling defendant excepted.’ Nothing is better settled than that challenges for cause must be specifically stated. The particular cause must be set forth. (*People v. Reynolds*, 16 Cal. 128; *Mann v. Glover*, 14 N. J. L. 195; *Powers v. Presgroves*, 38 Miss. 227; *Southern Pacific Co. v. Rauh*, 49 Fed. 696; *Drake v. State*, 20 Atl. 747; 2 Elliott’s Gen. Prac., sec. 530, and other cases there cited.) The facts constituting the cause of complaint were not given in this instance; the challenge simply amounted to the statement of a legal conclusion. The rule should be the same here as it is where general objections are taken to the evidence, that it is incompetent, immaterial, etc., and where it is held that general objections amount to nothing more than saying, ‘I object.’ Indeed, there seem to be more cogent reasons why specific objections should be urged in a case of this sort, where the question is as to the admission of a juror, than where it is as to the admission of a piece of evidence. At any rate, in either case, fairness to the court and to adverse counsel alike demand the grounds of the challenge for cause to be particularly set forth.”

The doctrine announced in that case on this point was reaffirmed in *State v. Reed*, 137 Mo. l. c. 132; *State v. McGinnis*, 158 Mo. l. c. 118; and in *State v. Evans*, 161 Mo. l. c. 108.

Counsel for the defendant, however, insists that in this

case the ground of the challenge was so apparent to the court and the opposite counsel that they could not have been misled as to the ground of the challenge. We are unable to concur in this view. These jurors had been fully examined as to their competency, and among other things as to their opinions formed from reading newspaper reports. If the objection was intended to be based specifically upon the ground of opinions formed or expressed, it should have been so stated and the matter properly preserved for our review.

Moreover, we are of the opinion that the jurors were not disqualified because they had formed an opinion from reading the newspaper reports of the Hottman trial and what purported to be Hottman's confession, because each one of said jurors testified that he could sit as a juror in this case and be governed solely by the evidence and render an impartial verdict, notwithstanding his opinion formed from the reading of such newspaper reports and such opinion as he had was based entirely upon the newspaper reports. Section 2616, Revised Statutes 1899, provides: "It shall be a good cause of challenge to a juror that he has formed or delivered an opinion on the issue, or any material fact to be tried, but if it appear that such an opinion is founded only on rumor and newspaper reports, and not such as to prejudice or bias the mind of the juror, he may be sworn." It is a well-settled law in this state that a person otherwise qualified to sit as a juror in a criminal case is not disqualified by reason of having formed an opinion as to the guilt or innocence of the accused, from reading partial newspaper accounts of the homicide, or from rumor when he states on his *voir dire* that he can give the defendant a fair and impartial trial. (*State v. Reed*, 137 Mo. 132, and *State v. Forsha*, 190 Mo. 1. c. 323, 324.) In the last cited case, certain of the jurors upon the *voir dire* examination answered that they had read a report of the Bailey trial, in which Bailey had been tried for the same murder, and that they had read what purported to be the evidence on that trial, including the testimony of the Biggs woman, who was present with Bailey and Forsha when the murder was committed, and from such reading had formed an opinion as to the guilt of the defendant, but that they could give the defendant a fair and impartial trial notwithstanding such

an opinion, and it was ruled that they were not disqualified. The grounds of disqualification in that case were almost identical with those urged in this, and we do not think rendered the jurors incompetent.

* * * * *

The judgment of the Circuit Court must be and is affirmed, and the sentence which the law pronounces is directed to be carried into execution.

BURGESS, P. J., and FOX, J., concur.

M'DONALD V. STATE.

Supreme Court of Indiana. 1909.

172 Indiana, 393.

MYERS, J. Appellant was convicted on an indictment charging him and another with conspiring for the purpose and with the intent unlawfully, feloniously and designedly to defraud the Adams Express Company, by preparing a package, securely wrapped, which package contained, among other things, two damp sponges, excelsior and damp phosphorus, so arranged that when sufficiently dried the phosphorus would ignite and cause such package and its contents to be burned and consumed; that, in pursuance of the conspiracy, they delivered the package to said express company to be transported from Indianapolis, Indiana, to Louisville, Kentucky, and falsely represented that the package contained papers of the value of \$10,000; that the conspirators intended, by the preparation of such package, and its delivery to the express company, that the contents of the package, while in possession of the company, should become sufficiently dry to ignite, burn and destroy the package, and to claim to have been damaged in the sum of \$10,000, and fraudulently and unlawfully to make demand upon the company therefor, and cheat and defraud the latter by obtaining money from such company by virtue of such false pretenses.

The only error assigned is upon the overruling of the motion for a new trial.

The questions sought to be presented arise upon alleged error in refusing the peremptory challenge of a juror on his *voir dire*, and in giving instructions. The evidence is not in the record. A bill of exceptions discloses that in impaneling the jury, when the jury had been passed back to the defendant's counsel for re-examination for the third time, and defendant had used but three peremptory challenges, being entitled to ten, the defendant peremptorily challenged a juror who had been in the jury box from the time the impaneling of the jury began, and the challenge was disallowed, "for the reason that, under a rule of said court, which had been in existence for many years, the defendant's peremptory challenge was made too late," said rule was stated by the court at the time as follows: "That each side, the defendant and the State, is entitled to examine each juror twice, and challenge, if desired, but cannot challenge a juror after the jury has been passed twice with each juror in the box. Said rule is an oral rule, and is not entered in the records of the court, but has been regularly enforced for many years." It is further recited that the defendant and his attorney, at the time of the challenge, did not know of the rule, but they did not inform the court on being advised of such rule that either or both of them were ignorant of it, and did not ask that it be suspended, nor that an exception be made to its enforcement, on account of such ignorance. We think it quite clear that there can properly be no such thing as an oral rule of a court. Rules of court, when legally adopted and promulgated, have the effect of positive laws. Sec. 1443, Burns 1908, sec. 1323 R. S. 1881; *Magnuson v. Billings* (1899), 152 Ind. 177; *State v. Van Cleave* (1902), 157 Ind. 608; *Smith v. State, ex rel.* (1894), 137 Ind. 198; 11 Cyc. 742.

They ought not only to be formally promulgated, but they should be definitely stated, which could not be true of a practice reposing solely in the breast of a judge. They should be published and made known in some permanent form, so that they might be known to all. The so-called rule was clearly not a rule at all, and binding upon no one—clearly not upon one who has no notice of it. The statutory provision (sec. 2099 Burns 1908, Acts 1905, pp. 584, 634, sec. 228), is as follows: "In prosecutions for capital offenses, the defendant may challenge, peremptorily, twenty

jurors; in prosecutions for offenses punishable by imprisonment in the state prison, ten jurors; in other prosecutions, three jurors. When several defendants are tried together, they must join in their challenges.

Irrespective of the so-called rule, was appellant denied a statutory right? No provision is made by statute nor by rule as to how or when the right shall be exercised, and it is claimed by appellant that it may be done at any time until the jury is sworn. In some jurisdictions the passing of a juror after he has been examined, tendered to and accepted by the other party, is a waiver of the right to challenge. In others, the right to challenge is in the sound discretion of the court. In others, a party who accepts a juror with knowledge of an objection waives the objection, but if a cause of objection is afterward discovered it is not waived, unless he is guilty of negligence in not discovering the objection. 24 Cyc. 322, 323. There is no showing made that appellant did not know from the beginning the grounds for the peremptory challenge, and he stands here upon the bare proposition that he was entitled to the challenge in any event, without offering any excuse to the court, or making any request for exemption or relief from the local practice. Had any request for exemption upon the ground that the so-called rule was void, or that the appellant or his counsel had no knowledge of it, been made, or if any reason were shown why the juror twice passed by appellant as satisfactory had been discovered to be unacceptable, a different question would be presented, for, independently of the so-called rule, appellant shows no ground for relief from his own act and acquiescence.

We think it cannot be said that the right of challenge is denied where it is restricted to a defined number of opportunities for challenge, nor that there must be a definite rule fixing the time when, or the manner in which, it must be exercised, for we think it may be controlled either by a fixed rule, or by any reasonable limitation imposed in any specific case, so long as the right of peremptory challenge is not taken away; in other words, that, when reasonable opportunity is given to challenge, the spirit of the statute is complied with, and that it does not mean that the right is an open one at all times until the jury is sworn, irrespective of all else; that there is no good reason why there may be spec-

ulation as to what the opposite party may do, and the jury passed backward and forward to await the action of the adversary; that the statute means that when the jury is passed to a party he must challenge peremptorily if he would challenge, in the absence of an after-arising condition, and that, when the opportunity was twice given, as here, and not exercised, a party cannot complain, unless new conditions arise, calling for an exception to, or relaxation of, the practice or the order in the particular case, and that if a given practice, not rising to the dignity of a rule, is invoked, as here, one to be exempt from its operation, on account of his ignorance of it, must seasonably apply to be relieved from its operation. At common law no challenge to the array or panel could be made until the full jury was present. 1 Chitty, Crim. Law (4th Am. ed.),*544. Our statute (sec. 2101 Burns 1908, Acts 1905, pp. 584, 634, sec. 230), was evidently adopted with this practice in mind, and the right to challenge contemplated the right to challenge as the panel thus full stood, or as it might stand, and not that the right should be one arising out of indefinitely passing the jury as acceptable.

In *Ward v. Charlestown City R. Co.* (1883), 19 S. C. 521, 45 Am. Rep. 794, after a plaintiff had announced that she had no objection to the jury, the defendant challenged two jurors, and plaintiff then claimed the right of peremptory challenge. The court said: "There was no denial on the part of the court; on the contrary the right was tendered to her at the proper time, and having waived the exercise of it then, for the reasons given by the circuit judge, we think it was too late to demand it after the defendant had exercised his right." It is said in *Mayers v. Smith* (1887), 121 Ill. 442, 448, 13 N. E. 216: "Under the practice at common law, no such case would arise as is here presented, of a party reserving his power of peremptory challenge until after he had examined and passed upon the whole twelve jurors, or eight of them, for causes of challenge, and then to claim the exercise of such right of peremptory challenge as to jurors who had previously been passed upon and accepted, for the reason that the practice there was to require each juror to be sworn when his examination was completed."

In *State v. Potter* (1846), 18 Conn. 166, a talesman was

called and examined by the counsel for defendant as to his bias, or for cause of challenge, and no objection appearing the court informed defendant's counsel that they could challenge him peremptorily. They declined to exercise the right at that time, as the panel was not full, and after it was full they challenged the juror peremptorily, and the court inquired whether any cause then existed which did not exist when they first declined the right. They answered in the negative, and the court held that the challenge came too late, and this ruling was upheld. The reasoning, which is pertinent here, is as follows: "Again, it is said, the prisoner has been deprived of a right to a peremptory challenge, which he was entitled to. It is not denied that time and opportunity were given to the prisoner to challenge a juror; but it is claimed, that he had not all the time the law allows him. Dickerman, a talesman, had been examined, and there was no cause of challenge known against them. The court then told the counsel, if they intended a peremptory challenge, they must make it at that time. They then had a reasonable opportunity to make their challenge; but they claim they may make it at their own time, provided it is done before the jurors are sworn. The statute, it is said, gives them power to challenge peremptorily twenty jurors summoned and impaneled,—and much criticism has been had upon the word 'impaneled.' It is claimed, that it means the jury sworn to try the cause; and that until sworn, they are not impaneled. * * * But it is said, that by the English practice, the party has a right to challenge until the jury is sworn. There, each juror is sworn, as soon as he has been examined and opportunity given for challenge. By our practice, jurors are none of them sworn until all have been examined, and an opportunity offered for challenge."

Under the statute of Arkansas, the state in criminal cases is required to exhaust its challenges before passing a jury to the defendant, and it was held that when the state had passed a jury to the defendant it was error to permit a peremptory challenge by the state. *Williams v. State* (1897), 63 Ark. 527, 39 S. W. 709.

Where, upon impaneling a jury, the judge announced that he would require the defendant to make his challenges as he desired, to each juror as called, it was held not error to re-

fuse a peremptory challenge after the juror was sworn and accepted, and it was held that, when there was a fair opportunity to interpose a peremptory challenge, the defendant cannot complain of a refusal to be allowed the further exercise of the right. *People v. Carpenter* (1886), 102 N. Y. 238, 6 N. E. 584.

We are not unaware that in the earlier cases in this State and in other states it is held that the right of challenge continues up to the swearing of the jury, but we are unable to perceive that any substantial right of a defendant is invaded when an opportunity for challenge of the full numbers is afforded and it is not availed of up to the time the jury is sworn. The object to be attained is an impartial jury, and while the right of peremptory challenge is an absolute one, it is not, we think, so far so that it may be exercised under all conditions. If, by the introduction of new men upon the panel, a cause for challenge should arise—such as the coming on of a person at such enmity to one already passed that they could not work in harmony, or the introduction of anything which might prejudice the right of a defendant—he would have a clear right to exercise his preference, and challenge the man already acceptable, rather than the new man, and the right would thus be preserved until the full panel is complete and the jury sworn. He has a right to a full panel to begin with, the right of canvass and comparison among jurors, and if his full right of challenge is preserved, within the line here indicated, it is practically a right of peremptory challenge until the jury is sworn, but it does not follow that the opportunity must be open under all circumstances or conditions, for it is a right which may be waived. Neither do we understand that the rule here declared is in conflict with the earlier holdings of the court, which upon examination are found to be general declarations as to the right of peremptory challenge extending until the jury is sworn, and did not involve any question of practice as to the mode of conducting the impaneling of juries, and of exercising the right of challenge, or of the right and power of courts to direct the manner of its exercise. * * * No reversible error is shown, and the judgment is affirmed.¹

¹*Order of challenges.* “The right to challenge jurors is one given and secured by law, and cannot be taken away by the court. Until the challenges

to which a party is entitled under the statutes are exhausted, the right extends to every juror called. The juror is first challenged for cause, either actual or implied bias; then peremptorily. In civil actions, each party is entitled to three peremptory challenges. G. S. 1894, § 5370. The usual practice in the selection of a jury in such actions is to require the peremptory challenges to be made by the parties alternately, one at a time, beginning with defendant." *Swanson v. Mendenhall*, (1900) 80 Minn. 56, 82 N. W. 1093.

STATE V. CADY.

Supreme Judicial Court of Maine. 1888.

80 Maine, 413.

PETERS, C. J. Two respondents were arraigned together under a joint liquor indictment, having the same counsel to answer for them. The judge allowed each respondent two peremptory challenges in impaneling the jury, and when one respondent in person challenged a juror, the other disputed the challenge, claiming that he had a right to have the challenged juror on the panel. One respondent accepted and the other rejected the juror.

The judge accorded to them two challenges each, while they were entitled to two jointly, and no more. In capital cases each prisoner, under a joint trial, is entitled to his personal challenges. The statute in that case prescribes that "each person" shall be so entitled. In all other criminal cases it is "the party" that is entitled to the two challenges. If they do not agree upon the persons to be objected to, they lose their challenges. The presumption is, where respondents in criminal cases, not lately capital, consent to be tried together, or where the judge in his discretion orders a joint trial, that their interests are alike, and differences between them are uncalled for. By R. S., c. 134, sec. 20, it is provided that issues in fact in criminal cases not capital, shall be tried by a jury drawn and returned in the same manner, and challenges shall be allowed, as in civil cases. By R. S., ch. 82, sec. 74, it is provided that in civil cases, and criminal cases not capital, "each party" is entitled to two peremptory challenges when a jury is impanelled by lot. Party does not mean person. Allowing challenges without cause is a merely statute right, not to

be extended by construction. Where defendants are numerous, if each had personal challenges, it would require the presence of an impracticable number of jurors. This question is settled by several authorities. *State v. Reed*, 47 N. H. 466; *Stone v. Segur*, 11 Allen, 568; *State v. Sutton*, 10 R. I. 159. These cases show that several respondents are but one party, and are entitled to no more challenges than one defendant. But if in his discretion, the judge extended a greater privilege than the statute concedes, neither respondent is in a position to complain of it. We have held in *Snow v. Weeks*, 75 Maine, 105, that to a ruling of a judge, in excusing or rejecting a juror, exceptions will not lie. It is there said: "He may put off a juror when there is no real and substantial cause for it. That cannot legally injure an objecting party as long as an unexceptionable jury is finally obtained. He may put a legal juror off. He cannot allow an illegal juror to go on." This question was exhaustively and learnedly examined in a case of piracy, *United States v. Marchant*, 12 Wheat. 480, in which Judge Story maintains the same doctrine, and he there says: "The right of peremptory challenge is not of itself a right to select but a right to reject jurors." He further remarks that the right "enables the prisoner to say who shall not try him, but not to say who shall be the particular persons who shall try him."

The objection to the county attorney's remarks is without force. He was expressing his judgment upon the testimony and giving illustrations of it in an unobjectionable manner. He was not relating outside facts. The other objections have no weight.

Exceptions overruled.

WALTON, DANFORTH, VIRGIN, LIBBEY and FOSTER, JJ., concurred.

SECTION 8. DISCHARGE OF JUROR.

STATE V. DAVIS.

*Supreme Court of Appeals of West Virginia. 1888.**31 West Virginia, 390.*

JOHNSON, PRESIDENT:

On the 20th day of February, 1888, William Davis was, in the Circuit Court of Ritchie county, indicted for maliciously, etc., stabbing one Creed Wilson, with intent to maim, disfigure, disable, and kill him. The prisoner moved to quash the indictment, which motion was overruled, and the prisoner pleaded not guilty. The jury was sworn on the 24th day of February to try the issue. It appears from an order entered on the next day that "it appearing to the court that Peter G. Six, a juror, is unable to perform his duty, George W. Hammer, a qualified juror, was selected, tried, and sworn in his place," etc. The prisoner objected to the swearing of a new juror, which objection was overruled.

* * * *

The prisoner moved the court to discharge him, because he had not been tried before a proper jury. He also moved in arrest of judgment, and also for a new trial; which several motions were respectively overruled, and the court pronounced judgment on the verdict, and sentenced the prisoner to confinement in the penitentiary for the term of two years.

* * * * *

Upshur, Judge, in delivering the opinion of the court in *Fell's Case*, 9 Leigh 617, said, after reviewing a number of English and American cases: "One general rule is deducible from all the cases, which is that the court may discharge the jury whenever a necessity for so doing shall arise; but what facts and circumstances shall be considered as constituting such a necessity can not be reduced to any general rule. The power to discharge is a discretionary power, which the court, as in all other cases of judicial discretion, must exercise soundly according to the circumstances of the case. The object of the law is to obtain a fair and just verdict, and, whenever it shall appear to the

court that the jury impaneled can not render such a verdict, it ought to be discharged and another jury impaneled. This is emphatically the case of necessity contemplated in the authorities we have referred to; as where the prisoner became too sick to attend to his defense or one of the jury was rendered physically unable to discharge his duty. There are other cases of necessity equally strong, one of which probably is where a juror, from the peculiar condition of his mind and feelings, is manifestly disqualified from bestowing upon the case that attention and impartial consideration which is necessary to a just verdict. * * * The actual sickness of a juror, and his consequent inability to discharge his duty, is admitted on all hands to present such a necessity. In the case before us, the juror was not actually sick, but there was every reason to believe that he would become so through longer confinement. Was the court bound to wait till the case actually occurred? We think not. * * * A necessity not less strong was presented by the situation of the wife of another juror. If the object of the trial be, as it undoubtedly is, to obtain a fair, just and impartial verdict, there can be but little prospect of such a result from the constrained and reluctant action of minds wholly absorbed in the deep and peculiar interest of their domestic relations." It was held that it would be improper, under such circumstances, to discharge the prisoner.

* * * * *

Here it appears from the record that the juror, Six, was informed that his son had just died. It would, indeed, be a stout-hearted father who could, unmoved, receive news of the death of a child. Some men could receive such news and proceed with their work with steady nerve and mind clear and strong; but observation teaches us, if, indeed, we have not learned from sad experience, that the natural result of information, suddenly imparted to a father, of the death of a child, is to unfit him, for the time, to attend to business. It would have been cruel to have required the juror to remain on the jury under such circumstances. His grief would naturally unfit him for the discharge of such an important duty. And if, as the court said in *Fell's Case*, the object of the trial is to obtain a fair, just and impartial verdict, there could be little prospect of it under such circumstances. * * *

* * * * *

The statute says—and it is in perfect accord with the principles of the common law—that if a juror, after he is sworn, be unable from any cause to perform his duty, the court may, in its discretion, cause another qualified juror to be sworn in his place. Code, ch. 159, sec. 7. * * *

* * * * *

Both on principle and authority, the court, in this case, did not err in discharging the juror Six, for the reason shown by the record, because a manifest necessity existed therefor. Neither did the court err in ordering the trial to proceed with the jury as constituted after the substitution of the juror Hammer for Six, as he had had his legal challenge to the original jurors and to the substituted juror. Every right guaranteed to him by the constitution was granted him. * * *

* * * The prisoner was not prejudiced by the fact that the juror Hammer had not heard everything that the other jurors heard. When the substituted juror was sworn, the trial commenced *de novo*. Then the prosecuting attorney introduced the evidence just as if the jury was entirely different from what it was before, and the defence, of course, had the right to bring forward all the evidence it could. We can not perceive how the prisoner was prejudiced by this. Certainly, nothing appears in the record to his prejudice in this respect. The court did not, therefore, err in refusing to exclude the evidence of the State.

* * * * *

There is no error in the judgment of the Circuit Court and it is affirmed.

Affirmed.

SECTION 9. OATH ADMINISTERED.

WELLS V. SMITH.

*Supreme Court of Appeals of West Virginia. 1901.**49 West Virginia, 78.*

BRANNON, President.—This is an action of ejectment * *. It resulted in a verdict and judgment for the plaintiffs.

* * * * *

The defendant complains of the overruling a motion in arrest of judgment. The ground for this motion is that the oath of the jury was not such as the law requires. The record says that a jury came “who were the duly tried and sworn the truth to speak upon the issue joined in this case;” whereas it should have been sworn, “You shall well and truly try the issue joined between Charles E. Wells and others, plaintiffs, against H. L. Smith, defendant, and a true verdict give according to the evidence.” The oath to try the issue joined is good in civil cases. It is the oath given as proper in that excellent work of late date, *Encyclopaedia of Pleading and Practice*, Vol. 12, p. 516. What does the oath in this case lack? Only the injunction to try the issue and render a verdict according to the evidence. Of course, the omission to enjoin the jury to render a verdict is immaterial, and as to the omission of the oath to enjoin the jury to render a verdict according to the evidence, that is immaterial, since the law requires a jury to pass on the evidence, to respond to facts shown by the evidence. By what else could the jury try the case? It is necessarily to be understood, in a legal point of view, that the trial must be by evidence. Even in a felony case the entry would be sufficient. In *Lawrence's Case*, 30 Grat. 845, the order book showed that the jury “were sworn the truth of and upon the premises to speak,” and it was held good. The court said that while the oath in felony cases, “You shall well and truly try and true deliverance make between the commonwealth and the prisoner at the bar, whom you shall have in charge, and a true verdict give according to the evidence. So help you God,”—is the correct oath, still no law prescribed it, common or statute, and one of the same import

would be sufficient, and that it was not necessary that the full form of the oath should be literally inserted in the record, but it would be sufficient that it should therein simply appear that the jury was duly sworn according to law. The court said that the statement of the record as to the oath was obviously not the form of oath actually administered, but was merely intended to state the fact that the jury was sworn. So we can say in this case. * * * I must not be understood as saying that if the record shows the oath actually administered in full, and it is not substantially good, it is not error, but I mean to hold that unless it so appears a mere statement of the record, in any words, attesting the swearing of the jury, both in civil and criminal cases, is sufficient. But this case being a civil case I think the oath shown by the record, even if regarded as the full literal oath, is good, though we are not compelled to so regard it, but may presume that the injunction to well and truly try the case according to the evidence was really in the oath administered. I just now discover that *State v. Ice*, 34 W. Va. 244, so holds. Ample authority so settles the point. See 12 Ency. Pl. and Prac. 522, where it is stated that the better entry is, not to give the oath in full but simply state that the jury was duly sworn according to law. I think so. Can we say that the oath in this case is not substantially good? "If the oath is substantially in the prescribed or recognized form, it will be sufficient, and a literal adherence to form will not be required." 12 Ency. Pl. and Prac. 518. Mere technicality should not be allowed such sway as is proposed in this case.

There is another reason why this point should not reverse the trial. The defendant had right to object to the oath when administered and to demand a proper one, if not satisfied with the one used, and he could not sit silent, take his chances of a verdict in his favor, and then take advantage of such a defect. He could have shown the oath actually administered by bill of exceptions, and must do so, as held in *Lawrence's Case*, 30 Grat. 650, and in *Dysen v. State*, 26 Miss. 32, and many other cases cited in 1 Thompson on Trials, s. 108. I will add that an oath such as that in this case, to try the issue joined, was held good on principle and authority in civil cases. *Pierce v. Tate*, 27 Miss. 283; *Windham v. Williams*, Id. 313. We affirm the judgment.

Affirmed.

CHAPTER VI.
THE RIGHT TO OPEN AND CLOSE.

JOHNSON V. JOSEPHS.

Supreme Judicial Court of Maine. 1884.

75 Maine, 544.

Trespass in which the plaintiff claimed damages in the sum of two thousand dollars for an alleged assault and battery by the defendant upon the person of the plaintiff.

The pleadings and the question presented to the law court are stated in the opinion.

* * * * *

PETERS, C. J. Plaintiff sued for an assault and battery. Defendant pleaded "*son assault demesne*," and plaintiff replied "*de injuria*." Under these pleadings the defendant, against the plaintiff's protest, was allowed by the court "to open and close." This was contrary to what we regard as the well settled practice in this state. The rule of practice and of law in this state, is that, when a plaintiff has to prove *anything* to make out a full and perfect case, he is entitled to open and close. The test is, whether he need put in any proof of any part of his claim. In this case, the burden fell upon him to prove the extent of the damages sustained. It is a case of unliquidated damages, and not a case of nominal damages, or of damages to be assessed by computation merely.

The plaintiff certainly had something to prove. The counsel for the defendant contends that the defendant's plea confessed everything alleged against him. We think not. It did not admit more than a general demurrer or a default would admit, and that would be nominal damages only. *Hanley v. Sutherland*, 74 Maine, 212, and cases cited. The plea of "*son assault demesne*" is but a qualified admission of the injury alleged. The point may be tested in this way: Suppose that, after the pleadings were com-

pleted the defendant had rested without any proof whatever. Judgment would go for the plaintiff, no doubt. But for how much? Would the court order judgment for the sum of one thousand dollars, the amount of damages which the plaintiff alleges, or would the plaintiff be required to prove the damages? Can it be, that a plea of *son assault demesne* admits any amount of damages which a plaintiff inserts in the *ad damnum* of his writ? If so, a plaintiff may prevent the plea in many cases by alleging exaggerated damages.

In fact, the defendant cautiously worded his plea to avoid admitting the whole injury charged. He says he did "unavoidably a little beat, bruise and ill-treat the said plaintiff." One of the issues of the case, therefore, was whether the beating was little or much. The declaration for an assault and battery is usually formal and general. Under the common form, in our practice, the plaintiff may prove malice as the foundation for punitive damages. The damages are necessarily a matter of uncertainty. The judicial discretion of a jury can be invoked by a plaintiff to settle them, and whatever the pleadings, if in the common form, there must be proof of the nature and extent of the injury sustained. We think there might be great abuse of the practice, if the ruling in this case be sustained. Defendants would adopt the plea of self defence, in order to have the last word, in cases where no real question exists but to have the amount of damages ascertained. It is not the natural order of things to hear the accused before the accuser is heard.

In the trial of this cause there was testimony upon both sides. No one would doubt that the plaintiff proceeded with testimony after the defendant's side was closed. The defendant had the privilege of closing the argument upon the question of the extent of the plaintiff's injury and amount of damages thereby sustained. To take the lead, a defendant "must admit all the facts necessary to be proved by the plaintiff," and not merely a *prima facie* case. *Spaulding v. Hood*, 8 Cush. 602. "When anything is left for the plaintiff to show, he has the right to begin and close." *Thurston v. Kennett*, 2 Foster, N. H. 151; *Belknap v. Wendell*, 1 Foster, N. H. 175. The latest authorities sustain the plaintiff's view upon this question. See 1 Green, Ev. sec.

sec. 75, 76, and English and American cases cited in notes of the latest editions. *Lunt v. Wormell*, 19 Maine, 100; *Sawyer v. Hopkins*, 22 Maine, 276; *Washington Ice Co. v. Webster*, 68 Maine, 449; *Page v. Osgood*, 2 Gray, 260; *Dorr v. Tremont National Bank*, 128 Mass. 359; *Carter v. Jones*, 6 C. & P. 64; *Mercer v. Whall*, 5 Ad. & El. N. S. 447.

The favor extended to the defendant deprived the plaintiff of a valuable legal right—one highly prized by advocates. It did not rest in the discretion of the trial judge to grant it. The rule should be fixed and certain, and not be subject to the varying judgments of different judges. The bar should know what the rule is, and that it may be depended upon.

*Exceptions sustained.*¹

WALTON, VIRGIN, LIBBEY and SYMONDS, J. J., concurred.

¹*Rule the same as to Evidence and Argument.* "The general rule is that the order of argument follows the burden of proof; and whoever opens the case with the evidence, if he has a right to so open, has the same right in the argument:" *Abel v. Jarrett*, (1897) 100 Ga. 732, 28 S. E. 453. To the same effect:—*D. M. Osborne & Co. v. Kline*, (1885) 18 Nebr. 344, 25 N. W. 360; *O'Connor v. Henderson Bridge Co.*, (1894) 95 Ky. 633, 27 S. W. 251; *Lowe v. Lowe*, (1875) 40 Ia. 220; *Palmer v. Adams*, (1893) 137 Ind. 72, 36 N. E. 695.

BUZZELL V. SNELL.

Superior Court of Judicature of New Hampshire. 1852.

25 New Hampshire, 474.

ASSUMPSIT. The declaration contained three counts, for the price of a sleigh. One upon an account annexed for \$26, the others special. One of these alleged a sale of the sleigh for \$26, and a contract to pay for it 275 bushels of charcoal, of a certain quality, to be delivered at a specified place and time, or to pay \$26 in money.

The defendant pleaded the general issue to the whole declaration, except the sum of seven dollars and ten cents, and as to that sum pleaded a tender, and issues were joined.

The court ruled that upon these pleadings the defendant was not entitled to the opening and close in the trial of the case, and the defendant excepted.

The plaintiff offered evidence tending to sustain his special count, and the proof on both sides was that the sleigh was called \$26 in the trade, and that the payment was to be 275 bushels of coal, or \$26 in money. The defendant did not contend that he had performed the original contract, whatever it was, but endeavored to show that 200 bushels of coal had been delivered and accepted in part payment, the plaintiff at the same time agreeing to receive money for the residue; but upon this point the testimony was conflicting. The court instructed the jury that the plaintiff was not bound to accept the coal, unless it was according to the contract in respect to time, quantity and quality, but he might waive his rights in any of these particulars; and that after the plaintiff had proved a contract for 275 bushels of coal, or the money, if the defendant would maintain that 200 bushels had been received in payment *pro tanto*, the burden of proof was upon him to show the fact. To this instruction, in relation to the burden of proof, the defendant excepted.

* * * * *

BELL, J. The principal question presented by this case is upon the right, claimed by the defendant, to open the case to the jury, and, consequently, to make the closing argument. The question whether the plaintiff or the defendant has the right, almost necessarily arises at the commencement of the hearing, and before the court can have any opportunity to know anything of the nature or character of the questions which are to arise upon the trial, except as they are disclosed by the pleadings. The right is, therefore, usually held to depend upon the state of the pleadings. "The party who asserts the affirmative of the issue is entitled to begin and to reply." 1 Green. Ev., sec. 74. "If the record contains several issues, and the plaintiff holds the affirmative in any one of them, he is entitled to begin." *Ib.*

This question was considered, and the cases collected and examined, in the case of *Belknap v. Wendell*, 1 Foster's Rep. 175. Gilchrist, C. J., there lays down the rule thus: "The plaintiff begins and has the right of reply, in all cases where the defendant's pleadings, or any part of them, deny the whole or any part of the plaintiff's pleadings, so as to leave any affirmative allegation on his side to be estab-

lished by proof." "And this (he says) is uniformly the case, unless the defendant, by the form of pleading, admits the plaintiff's right of action, but for the cause which he sets up in his plea, no proof in such case being required on the part of the plaintiff." This rule is in accordance with the practice in this State. We are not aware that there has ever been any difference of ruling in the common pleas, or of decisions in this court, or that any exception has ever been admitted in this respect.

This case comes clearly within the rule in *Belknap v. Wendell*, since the affirmative of one of the issues is upon the plaintiff. Two pleas are filed. The first is the general issue as to all the plaintiff's claim, except the sum of seven dollars and ten cents. Upon this issue, it is the duty of the plaintiff to go forward, and introduce proof of the facts alleged in his declaration; and if he does not, the case of course must end in a non-suit. Before this is done, he cannot call upon the defendant to take any step in the cause.

The second plea alleges a tender as to seven dollars and ten cents. Upon this the burden of proof is upon the defendant. But it is suggested that as a plea of tender is an admission of the plaintiff's cause of action, as set forth in his declaration, this has the effect, substantially, to change the issue upon the first plea. We do not so regard it. The right, by the rule in *Belknap v. Wendell*, depends upon the form of the pleading, and is determined by the fact that the affirmative of one of the issues is upon the plaintiff, and this is in no way affected by the circumstance that the plaintiff has greater or less facilities for making the required proof. Any material fact may be proved by the admissions of the adverse party; and it does not change the burden of proof upon the pleadings, that the defendant has admitted the claim, which he formally denies by his plea. Nor is it in any way material in what form the admission is made, so long as he chooses to deny it upon the record, and join issue upon it.

The admission is evidence of a matter of fact, to be decided by the jury, and the plaintiff, to sustain his case, must lay that evidence before them. In this respect, the admission of the contract declared upon, implied from the payment of money into court, stands upon the same ground as the admission of the signature of a written instrument de-

clared upon, resulting from a neglect to give notice upon the docket of the denial of such signature, according to the general rule of the court. In actions upon promissory notes, the proof of the signature of the instrument is all that the plaintiff is required to make, upon the general issue; and this is admitted under the rule by the want of notice of a denial, upon the docket. It has never occurred to any one to imagine that this admission changed the burden of proof upon the general issue, or gave to the defendant a right to begin and to reply.

This question, substantially, arose in the case of *Gump v. Smith*, 11 N. H. Rep. 48. The general issue was pleaded, with a brief statement. A fact, necessary to be proved by the plaintiff, was admitted by the statement. But the court held that the general issue imposes upon the plaintiff the burden of making out his whole case, before the matter of the brief statement comes in issue at all; and the same, the court say, is the result where special pleas are pleaded with the general issue. This decision is but a recognition of the common principle, that where several pleadings are filed, they are to be tried precisely as if each was pleaded alone; and the admissions, expressed or implied, in one plea, cannot be used as evidence against the party upon other issues. *Cilley v. Jenness*, 2 N. H. Rep. 89; *Chapman v. Sloan*, 2 N. H. Rep. 467.

The plea of tender is of course not evidence upon the general issue for any purpose, but the independent fact of the payment of money into court with the plea of tender, is an admission of the contract declared on; but this fact is to be proved by the plaintiff, like any other admission. Upon the pleadings in such case, nothing appears which changes the ordinary effect of the general issue.

The question presents itself under an entirely different aspect from that it would have had, if the defendant, instead of pleading the general issue, had pleaded what seems to have been his true defence, either payment or a delivery and acceptance *pro tanto* of coal, of a different quality, and perhaps at a different place. In that case, the burden of proof upon both pleas would have been upon the defendant, and the right to begin and close, would have belonged to him. This would have been apparent at once upon the record, but upon the general issue, it cannot appear that the

defence is payment or its equivalent. Nor does it seem to us that it can ever be desirable to substitute for the simple inquiry by which the courts now determine the right to begin,—the form of the issues,—any inquiries as to what are the real points in controversy.

The second point raised by the exception, as to the duty of the defendant to prove the defence of payment, if he relies upon it, is admitted by the defendant to have been correctly decided in itself; but it is insisted upon to show the incorrectness of the ruling as to the right to open and close. It surely could not be expected that the court would hold that the plaintiff was bound to prove the defendant's plea, nor that it was to be taken for granted without proof, or the plaintiff required to disprove it. In our judgment, there was no inconsistency in holding that upon the pleadings, as they were drawn, the burden of proof was upon the plaintiff, and that he was, therefore, entitled to begin and close; and in holding afterwards, when the defendant had taken upon himself his defence, that if the defendant relied not upon a denial of the plaintiff's claim, but upon a discharge of that claim by new and independent facts, that the burden was upon him to prove his defence. This point was before the court in *Belknap v. Wendell*, where the court say, "The burden of proof may shift during the trial. In a suit upon a written contract, the plaintiff produces his evidence, proves the signature of the defendant, and stops; the defendant then alleges payment, or other matter of defence; the burden of proof is upon him, and yet the plaintiff opens and closes the argument."

* * * * *

Judgment is to be rendered upon the verdict, * * *

LAKE ONTARIO NATIONAL BANK V. JUDSON.

*Court of Appeals of New York. 1890.**122 New York, 278.*

This action was brought to recover the amount of four promissory notes, which, by the complaint, the plaintiff alleged were made by the defendant payable to the order of E. M. Fort, delivered to the payee, and by him endorsed, and transferred to the plaintiff. The complaint also alleged that the defendant was indebted to respondent in a sum stated, for money advanced on his checks drawn upon the plaintiff for an amount in excess of his deposits there.

The defendant, by his answer, alleged that he and Fort purchased of the plaintiff some canal boats; that they were induced to make the purchase by the warranty of the plaintiff, particularly specified, and gave for them their joint notes; that afterward the plaintiff took up those notes, and the makers gave their individual notes for their respective interests in the purchase to the plaintiff, which notes were received by the plaintiff "in place of and in payment of said first-mentioned notes, and which notes last given are the notes, and the renewal thereof set forth in the complaint." The answer then alleged a breach of this warranty and damages as the consequence; it also alleged, by way of counter-claim, that the plaintiff was indebted to defendant in a further sum for services performed by him for and at the request of the plaintiff, for which, with the amount of damages for the alleged breach of warranty, he demanded judgment. And for further answer he denied the complaint, and each and every allegation therein contained except as thereinbefore admitted. The plaintiff, by reply, put in issue the new matter of the answer constituting the alleged counter-claims. The trial court directed judgment for the amount of the notes and of the overdraft mentioned in the complaint.

Further facts appear in the opinion.

* * * * *

BRADLEY, J. The contest on the trial mainly had relation to the defendant's alleged counter-claim for services, upon which claim he gave evidence to the effect that they were

performed by him pursuant to an agreement with the plaintiff, by which the latter undertook to pay him \$2,500, of which \$160 had been paid. This claim, and the evidence on the part of the defendant tending to support it, were disputed by the evidence on the part of the plaintiff, and the trial court found the facts against the defendant. For the purpose of this review, the findings and determination of the court below must be deemed conclusive. Upon the trial the question as to which party was entitled to the closing argument was raised; the court held that the plaintiff had the right to it, and the defendant excepted. The rule that the party having the affirmative of the issue in an action shall have the opportunity to make the opening and closing presentation of his case is deemed founded upon a substantial right, the denial of which is error. (*Conselyea v. Swift*, 103 N. Y. 604.) In its application to trials by jury it has ordinarily more practical importance than in those before the court without a jury and before referees. If it appears that a party could not have been prejudiced by the failure of the court to observe this rule, the error would not be available, and in trials by the court without jury or before referees that question would be dependent upon the circumstances of each case. In the present case the view of the court evidently was that the affirmative of the entire issue was not with the defendant, and that is the question presented for consideration. The denial by the defendant in his answer, except as therein admitted, of each and every allegation of the complaint, put in issue any material allegation of the complaint not distinctly admitted by the answer. (*Allis v. Leonard*, 46 N. Y. 688; 22 Alb. L. J. 28; *Calhoun v. Hallen*, 25 Hun. 155.) The charge in the complaint, in due form, of the indebtedness of the defendant to the plaintiff for the amount advanced to him upon his check in excess of the balance of his account with the plaintiff, was not admitted by the answer, but was controverted by such denial. It appears that after the trial had been moved and the plaintiff, by its counsel had, by statement of it, made the opening of the case to the court, the defendant orally admitted the count of the complaint alleging the overdraft. * * * The question arises whether the oral admission at the trial of the plaintiff's claim for the amount of the defendant's overdraft, entitled him to the right of closing the argument on

the final submission of the case to the court for determination. And that depends upon the question whether the affirmative of the issue, with a view to such a right, must be ascertained from the pleadings, or may arise from admissions orally made at the trial. The issues to be tried can be ascertained only by reference to the pleadings, and they must govern so far as relates to the right of the parties to open the case at the beginning and conclude the argument at the close of the trial. When the parties go to trial they respectively assume the burden of establishing that which they have affirmatively alleged as a cause of action or counter-claim, if it is controverted by allegation sufficient to put it in issue. The admission of a fact upon the trial is evidence merely. It may obviate the necessity of further trial of the issue to which it relates, but does not change it as represented by the pleadings. That can be done by amendment only. It is true that the admission made at the trial may reduce the controversy to matter as to which the affirmative is with the defendant. Such would be the effect of evidence of any character, undisputed and indisputable of the facts constituting the alleged cause of action. The right under consideration does not depend simply upon the admission of those facts, unless they are admitted or uncontroverted by the answer; otherwise it is evidence only. There is no occasion to extend the rule so as to give effect for such purpose, to concessions at the trial. This might lead to the adoption of such a course when further dispute of the facts upon which a plaintiff relies may appear hopeless to a defendant, for the purpose of obtaining the right of closing the trial. There is no apparent reason for applying such rule to any one more than to any other stage of the trial. The defendant who may wish to take the right of opening and concluding the trial, must frame his pleading with that view, and so as to present no issue upon any allegation of the complaint essential to the plaintiff's alleged cause of action. If the defendant fail to do that, no matter how little proof the remaining issue may require, or how easily, or in what manner it may be established by evidence, the right of the plaintiff to open and close the case is not denied to him. (*Mercer v. Whall*, 5 Ad. & El. (N. S.) 447.) The test is, whether without any proof, the plaintiff, upon the pleadings, is entitled to recover upon all the causes

of action alleged in his complaint. If he is, and the defendant alleges any counter-claim, controverted by the plaintiff's pleading or any affirmative matter of defense in avoidance of the plaintiff's alleged cause of action, and which is the subject of trial, the defendant has the right to open and close, otherwise not. * * * If the defendant, by permission of the court, had stricken out the denial in his answer, or amended it by inserting the admission orally made, a different question would have been presented at the trial upon the claim of the defendant to the right to conclude it.

No other question requires the expression of consideration.

The judgment should be affirmed.

All concur except FOLLETT, Ch. J., not sitting.

Judgment Affirmed.

¹*There is some authority for the rule that admissions made at the trial will determine the right to open and close. See Abel v. Jarrett, (1897) 100 Ga. 732, 28 S. E. 453.*

GARDNER V. MEEKER.

Supreme Court of Illinois. 1897.

169 Illinois, 40.

MR. JUSTICE WILKIN delivered the opinion of the court:

This was a suit in assumpsit upon a promissory note for \$1,000, given by John J. Girtin and William C. Girtin to Nash, Wright & Co., dated September 6, 1889, due in ninety days, and duly assigned to one Henry A. Gardner. The defendant John J. Girtin was not served. The defense made by William C. Girtin was, that the consideration of the note was a balance due upon certain transactions on the Board of Trade of Chicago, which were in violation of the statute against option dealing in grain, and the note was therefore void. There was a verdict and judgment for the defendant. * * *

* * * * *

After the trial had begun the defendant withdrew his plea of the general issue, and the court, over the objection of the

plaintiff, permitted him to have the opening and closing of the argument. This, also, is assigned for error. The rule on the subject of the opening and closing of the argument is this: "That where the plaintiff has anything to prove in order to get a verdict, whether in an action *ex contractu* or *ex delicto*, and whether to establish his right of action or to fix the amount of his damages, the right to begin and reply belongs to him." (1 Thompson on Trials, sec. 228; *McReynolds v. Burlington and Ohio River Railway Co.*, 106 Ill. 152.) The withdrawal of the plea of the general issue amounted to an admission of the right of the plaintiff to recover the amount of the note sued on, unless the defense alleged in the special pleas was proven by a preponderance of the evidence. There is no doubt that the defendant had a right, before the commencement of the trial, to withdraw the general issue and rely upon the special pleas, and if he did so, he would have the right to open and close. (*Harvey v. Ellithorpe*, 26 Ill. 418; *Carpenter v. First Nat. Bank*, 119 id. 352.) The trial court had the right, in the exercise of a sound, reasonable discretion, to permit the issues to be changed, and to allow the defendant, in consequence thereof, to assume the affirmative and to open and close the argument, as well after the case was on trial as before, and we think that discretion was not abused in this case. Nor was it error to permit the defense to file additional special pleas in the midst of the trial, no affidavit of surprise or application for continuance having been made.

* * * * *

The judgment of the Appellate Court will be affirmed.

*Judgment affirmed.*¹

¹*Statutory Modification of Rule.* The practice is sometimes governed by statute. Thus, in *Schoonover v. Osborne*, (1902) 117 Iowa, 427, 90 N. W. 844, it was held that under code § 3701, the right to open and close the argument is to be determined by the evidence, and not by the pleadings.

Discretionary or of right. In some jurisdictions the opening and closing is held to be a matter resting in the discretion of the court. *Woodward v. Insurance Co.*, (1899) 104 Tenn. 49, 56 S. W. 1020; *Smith v. Frazier*, (1866) 53 Pa. St. 226; *Young v. Newark Fire Ins. Co.*, (1890) 59 Conn. 41, 22 Atl. 32. But in the great majority of jurisdictions it is deemed a matter of right.

In *Michigan*, where the defendant is obliged in all cases to file a general issue, he may obtain the opening and closing under Circuit Court Rule 24 (c) by expressly waiving the benefit of the general issue and admitting the facts alleged in the plaintiff's declaration, this being done by a special notice accompanying the general issue.

CHAPTER VII.

OPENING STATEMENT OF COUNSEL.

SCRIPPS V. REILLY.

Supreme Court of Michigan. 1877.

35 Michigan, 371.

GRAVES, J.

Defendant in error recovered judgment in the superior court of Detroit in an action for libel, and plaintiff in error complains of various proceedings at the trial.

Defendant in error was a lawyer in practice in Detroit. He was a single man. In the spring of 1875 he was elected circuit judge of Wayne county, and in the fall thereafter was appointed to fill a vacancy caused by the resignation of Judge Patchin.

In 1873 plaintiff in error began publishing the newspaper called the "Evening News," and has continued the publication since that time. In 1875 the paper had a large daily circulation and the news items of each issue averaged some two hundred. The parties were not personally acquainted, but the paper opposed the election of defendant in error and supported another gentleman, and during the canvass some intemperate articles were published. Some time in the fall after the election one Robbins filed a bill in the superior court to obtain a divorce from his wife, and among other charges in the bill against her, alleged that she had been guilty of adultery with defendant in error.

Almost immediately after this bill was placed on file, a reporter and gatherer of local news for the paper got access to the bill, and with the help of the city editor prepared an article covering this charge in Robbins' bill, and caused it to be published in the paper. This occurred on the 7th of December. This article is the libel complained of. The action was commenced the next day. * * * * *

The first in the order of proceeding at the trial seems naturally to call for attention first.

It relates to the course the counsel for defendant in error was permitted to pursue, against repeated objections, in opening the case to the court and jury.

He declared it to be his purpose, as part of his opening, to read at length before the jury a series of articles published in the newspaper during the course of several months and commencing in the spring of 1875 and running until some time after the appearance of the publication in suit.

And the first group suggested consisted of articles from the 19th of March to the 6th of December, and none of which referred to defendant in error. The reading of them was objected to on the ground that neither of them would be relevant or competent if regularly offered as evidence under the issue. Counsel for defendant in error then stated that he proposed to read such articles as in good faith he should offer in evidence, and he would read them because he could not remember their contents. The court thereupon ruled that he might read in his opening such articles as he claimed to be libelous, and which had been afterwards retracted.

About twenty articles, not relating to defendant in error, and running through the period before indicated, were then read to the jury as part of the opening. An exception was taken to each. They were calculated from their character to influence the minds of the jurors against plaintiff in error. The counsel for defendant in error then offered to read at length, as part of his opening, a series of articles published the spring before the publication charged as libelous, concerning the defendant in error when running for the office of circuit judge.

This was objected to on the ground that the articles did not tend to show actual malice, and would not be competent if offered as evidence. Counsel for defendant in error then explained that he did not propose to then read them as evidence to show malice, but to read such as he expected to offer and prove afterwards, and such as when put in evidence would tend to show malice towards defendant in error. The court overruled the objection and allowed counsel to read as he proposed. He then read, as part of his opening to the jury, five articles he claimed tended to show actual malice by plaintiff in error against defendant in er-

ror. They bore date March 12th, March 22nd, March 29th, March 31st, and April 3rd, 1875.

The counsel for defendant in error then proposed to read at length, as part of his opening and not as evidence, another series of articles published after the libel.

This was objected to on the ground that the articles would not be competent or admissible if offered as evidence. They all referred to the alleged libelous article and the legal proceedings growing out of it.

The objection was overruled. * * * * * The opening statement having been allowed to embrace the reading in full of all these publications, and having been brought to a close, the counsel for defendant in error proceeded to offer evidence. None had yet been received, and although the plaintiff in error had not been able to prevent the reading of the publications to the jury he was still not able to meet them as evidence, for any purpose or in any way.

They were lodged in the jurors' minds as matters in the cause they were entitled to receive, but not through the channel the law has made for the conveyance of evidence. or at the stage of proceeding proper for submitting evidence. They were matters which could not fail, when so presented, to prepossess the jury unfavorably against the plaintiff in error. Confining attention now to this branch of the case, it appears from the record, that of the series of publications not relating to defendant in error, and permitted to be read at length in the opening statement, on the pledge that they would be afterwards offered in good faith as evidence, five were not even offered as evidence at all at any stage of the trial, and as to one other the record is contradictory; some ten or a dozen or more, the record being ambiguous as to a few, were not offered except upon the rebutting case, and were then rejected by the court; and the residue of this list, being five or six, were reserved until the plaintiff in error had rested his defense, and were then offered and admitted as rebutting evidence.

Of the series published in the spring of 1875, concerning the candidacy of defendant in error as circuit judge, and which were read at length in the opening, on the avowal of counsel's belief that they intended to show actual notice by plaintiff in error against defendant in error, and would be offered in evidence for that purpose, not one was offered

during the making out the case in chief. They were held back until the plaintiff in error had rested, and were then tendered as rebutting evidence. All were excluded. There were five in this group.

Of the set published after the appearance of the alleged libel, five were given in evidence by the defendant in error to show actual malice, and they were so given, but against objection, as part of his case in chief. * * * * *

When the judge came to charge the jury, he referred to the course which he had permitted in respect to the opening statement, and observed, "Mr. Griffin in his opening read several articles which at the trial were finally excluded. These should also be withdrawn from your consideration and laid out for view in your deliberations upon the case."

No further reference was made to the subject of the opening statement, and no caution whatever was given concerning the articles which had been read at length by permission of the court against objection, but which had not even been offered in evidence at all.

The question is, whether the practice which was here allowed in the opening address was correct, and if not, whether the advice quoted from the charge cured the error, and in case it did not, then whether it is competent for this court to revise the proceedings.

The trial judge must always have a very large discretion in controlling and managing the routine proceedings at the trial, and it is not necessary to specify the matter to which such discretion extends. It applies beyond doubt to the addresses of counsel as well as to other incidents. But it must be a reasonable, a legal discretion, and whether it be so or not must depend upon the nature of the proceeding on which it is exercised, the way it is exercised and the special circumstances under which it is exercised. It can never be intended that a trial judge has purposely gone astray in dealing with matters within the category of discretionary proceedings, and unless it turns out that he has not merely misstepped, but has departed widely and injuriously, an appellate court will not re-examine. It will not do it when there is no better reason than its own opinion that the course actually taken was not as wise or sensible or orderly as another would have been. For example, if all the articles allowed to be read in the opening statement had been

afterwards given in evidence, their reading in the opening, however contrary to settled practice, might not have offered anything proper for consideration here. Questions concerning their admissibility would fall under another head. But where it is manifest the trial judge has fallen into a *serious mistake*,—one likely to have hurt a party,—an error mentioned in the books as an abuse of discretion,—this court is bound to take cognizance, or disregard its constitutional duty of supervision.

It is a chief duty of the trial judge to secure fair play to litigants, and so far as practicable to shape the order and course of proceedings in such a way that neither party will be put to a disadvantage not due to his case or its mode of management by his counsel. The rules of the court, and what is called the course of the court, have their origin in the purpose to secure fairness in legal controversies, and the order of business and the regulated succession of steps at trials have the same object.

The rule (62) ordained by this court for the circuit courts in regard to an opening statement, is especially meant to guard against surprise and deception and to promote fairness. And when it declares that "it shall be the duty of the plaintiff's counsel, before offering evidence to support the issue on his part, to make a full and fair statement of his case and of the facts which he expects to prove," it indicates very distinctly the extent of both right and duty. It draws a line between "evidence" and "facts," and contemplates a "fair" statement of the "facts" expected to be "proved" before putting in the testimony or "evidence" by which these "facts" are expected to be "proved." Neither the nature of the proceeding, nor that fairness it is intended to promote, nor the plain meaning of the rule, gives any sanction to the claim that in this opening statement the plaintiff's counsel may read at length to the jury any documentary matter he may assert his intention of subsequently offering as evidence. But the position taken in this cause involves the assertion of the right to fill up the opening statement with any depositions on file and the whole of oral statements of expected witnesses, without regard to objections to admissibility as evidence. Surely it cannot require much thought to decide against the reasonableness and fairness of such a practice.

The text books in this country which deal with the subject are distinctly agreed concerning the end and scope of this opening address. They all represent it as a proceeding prefatory to putting in evidence, and as one practically necessary to make an advance exhibit of the legal nature of the controversy and its salient peculiarities, and enable the judge, jury and opposing counsel to apprehend the necessities of the plaintiff's case and correctly understand the drift and bearing of each step and each offer of proof as it shall occur subsequently. And considering that its office is to afford preliminary explanation, that it is to precede proofs and precede controversy before the jury, and is not to embody or convey proof or prepossess the jury, they unite in substantially denying the right to make use of it to get before the jury a detail of the testimony expected to be offered, and especially any not positively entitled to be introduced, and deny the right to use it as a cover for any topics not fairly pertinent. A brief summary or outline of the substance of the evidence intended to be offered, with requisite clear and concise explanations, are considered proper. But a relation of expected oral testimony at length, or a reading of expected documentary proofs at large, or any other course fitted to mislead the triers, should not be tolerated. Of course there may be cases and instances where a statement of the evidence itself, or a reading of a paper, may be convenient and harmless. Such, however, must be exceptional, and not within the spirit of the general requirement. * * * *

The courts have usually been very firm in confining counsel within proper bounds and in guarding jurors against unfair and irregular acts and endeavors, and parties have been deprived of their verdicts upon evidence merely indicating the operation of influences about the outskirts of the trial. It has been many times ruled that counsel in arguing may not seek to influence the jurors by reference to matters in the nature of evidence not in proof before them, and that the trial judge should promptly repress the attempt as something reprehensible. * * * *

* * * * *

In the case of *The State v. Hascall*, 6 N. H. 352, the defendant was convicted of perjury, whereupon it was shown that papers calculated to make an unfavorable impression

on the jury were exhibited by the prosecutor at several public places where jurors boarded, and were read in the hearing of jurors during term and before the trial, and the court decided that for this cause the verdict should be set aside.

In *Spenceley v. De Willot*, 7 East R. 108, which was an action for usury, a new trial was granted because the plaintiff had published a statement of the case which was distributed about the court and hall before and at the time of trial; and in *Coster v. Merest*, 3 Brod. & Bing. 272, a new trial was allowed on an affidavit stating that handbills reflecting on the plaintiff's character had been distributed in court at the time of the trial and had been seen by the jury, and the court refused to hear affidavits, made by all the jurors, stating that no such placard had been shown to them. There is no occasion for dwelling on this part of the case after what has been said. The practice pursued was wrong, and the error was not cured or materially alleviated by the charge. The jury were not even told to disregard such of the articles as were read in the statement of the case and not afterwards offered in evidence, and the special direction to refuse attention to those which had been offered and rejected was calculated to imply in the jurors' minds that they were entitled to regard all others. The omission to tell the jury to disregard the articles not offered was no doubt an inadvertence of the court. The effect, however, was the same as if it had been designed. But if the charge had been to disregard all unadmitted articles it would not have cured the error. Because it is quite impossible to conclude that the jurors had not been influenced too far by the erroneous rulings and proceedings, to be brought into the same impartial attitude by the court's admonition, which they would have held if the counsel for defendant in error had been properly confined in his opening statement. The course of fair and settled practice was violated to the prejudice of plaintiff in error, and it is not a satisfactory answer to say that the court went as far as practicable afterwards to cure the mischief, so long as an inference remains that the remedy applied by the court was not adequate. And there is no doubt of the right of this court to revise in such a case as this. If the trial court may pursue any course it pleases in relation to the opening statement, if it may act inde-

pendently of all control, then the idea of a rule to be prescribed by this court under the constitution and legislative enactment for its guidance and government, is preposterous and absurd. But the point is too plain for argument. As already suggested, this court will not revise such matters unless there is plain evidence of action amounting to what is called an abuse of discretion and calculated to injuriously affect the legal rights of a party, and where such is the case, whether the result of accident, or inadvertence, or misconception, it will take cognizance. The error in this case was not cured, and is one subject to review, and is sufficient to require a reversal.

* * * * *

The judgment must be reversed, with costs, and a new trial ordered.

FOSDICK V. VAN ARSDALE.

Supreme Court of Michigan. 1889.

74 Michigan, 302.

MORSE, J. * * * *

The record shows that, after the primary case of the plaintiff was closed,—

“V. H. Lockwood proceeded to state the defendants’ case to the jury, and during the opening proceeded to state the law governing the defendants’ case, and upon which the defense was based; whereupon the counsel for the plaintiff interposed an objection, and the said court sustained the objection, stating that the law would come from the court in due time.”

This is made the first assignment of error in defendants’ brief.

We are not able, from this meager statement in the record, to know whether error was committed or not by this action of the circuit judge. But counsel have the right in stating their case to the jury at the opening to briefly set forth what points of the law they rely upon, and the nature of the testimony they propose to introduce to support

such points. It is true the law is to be given by the court; but, as it is not given in most cases until the testimony is ended, and the counsel have summed the same up in support of their case before the jury, the counsel have the right, both in opening the case to the jury, before the testimony to support their case is offered, and when closing the argument, after the testimony is in, to state to the jury that they claim the law to be thus and so, and that they shall request the court to so instruct them, and that they will adduce such and such testimony to support their claim under the law in the first instance, or at the close to state that the evidence in the case, under the law as they shall claim it to be, establishes their right to a verdict at the hands of the jury. The counsel have no right to read law to the jury, or to usurp the province of the court in any way in this respect, but they have the undoubted right to state so much of the law, as they claim it to be, as may enable them to lay before the jury an intelligent idea of the force, effect, and bearing of the testimony upon their case, either before or after said testimony is in the case.

* * * * *

SAN MIGUEL CONSOLIDATED GOLD MINING COMPANY V. BONNER.

Supreme Court of Colorado. 1905.

33 Colorado, 207.

MR. JUSTICE CAMPBELL delivered the opinion of the court.

The dispute is over a strip of mining ground claimed by plaintiffs and appellants as a parcel of the Happy Home placer, and by defendant (appellee) as a part of the Loop-ton lode mining location. The owner of the lode claim first applied for a patent, and appellants, as owners of the placer, filed in the United States land office their protest or adverse claim against the same, and seasonably brought this action in its support. Trial was to the court and jury, and a verdict was returned for defendant on which judgment was

rendered, and plaintiffs are here with this appeal, urging as grounds for reversal alleged erroneous rulings below, to the consideration of which we now proceed.

1. In his opening statement to the jury counsel for plaintiffs, after stating to the jury that they were to take the law from the court in instructions that would be given at the close of the trial and before argument, proceeded to state the law applicable to the case, as he understood it, for the alleged purpose of giving to the jury his theory of the case, so that they might be the better enabled to appreciate and apply the facts as they were elicited during the trial. To this course defendant objected, in which he was sustained by the court. In support of plaintiffs' exception to the ruling they insist that a plaintiffs' counsel has the absolute right to state to a jury in his opening address not only the case as made by the pleadings, and the evidence by which he proposes to sustain it, but that he may also state so much of the law as, in his judgment, is necessary to enable him to convey to the jury an intelligent idea of the force, effect and bearing of the testimony in the case. To this are cited:—*Fostick v. Van Arsdale*, 74 Mich. 302; *Prentis v. Bates*, 93 Mich. 234; *McDonald v. People*, 126 Ills. 150; 2 Enc. Pl. & Pr. 706.

To the contrary appellee cites:—*Giffen v. Lewiston (Idaho)*, 55 Pac. 545, 549; *Hill v. Colorado National Bank*, 2 Colo. App. 324-9; *Felt v. Cleghorn*, 2 Colo. App. 4-8; *Pickett v. Handy*, 5 Colo. App. 295.

The respective contentions are substantially sustained by some of these authorities. Whatever the practice may be in other jurisdictions, our code, section 187, in prescribing the order of trials by jury, provides that after the jury is sworn, unless for good cause shown the court otherwise directs, the proceeding shall be:

“First.—The party on whom rests the burden of the issues may briefly state his case, and the evidence by which he expects to sustain it.

“Second.—The adverse party may then briefly state his defense, and the evidence he expects to offer in support of it.”

These clauses confer upon respective counsel no authority in opening to state the law of the case to the jury. Subdivisions 6 and 7 of the same section require the court to

give instructions upon the law after the evidence is closed and before argument is begun, which may, in all cases, be read to the jury and commented on by the attorneys in argument, and, if requested by either party or the jury, may be taken by the latter in their retirement. Ample provision is thus made for counsel, at a certain stage in the progress of the trial, to read to the jury, and comment upon, the law of the case which the jury must take from the court. The mere fact that the court does not allow counsel in his opening to exercise the statutory right here given, and before he could know what the court would declare the law to be, instead of in his argument at the close of the case, where the code says it shall be enjoyed, is not something of which a party may complain. In other words, since the code has declared what a party may state to the jury in his opening, he may not, as of right, make any statements other than those specially permitted.

Furthermore, the right of counsel here asserted, if it exist at all, does not, as already said, spring from statute. Practice and procedure, outside of statutory provisions, are so largely within the sound discretion of trial courts, and the conduct of trials and the latitude to be allowed counsel are so largely within their control, that, except for illegal or gross abuse of discretion, their action with respect thereto should be upheld.—*McClure v. Sanford*, 3 Colorado, 514, 518. From the brief reference found in the abstract, we do not believe that any prejudice could have resulted to plaintiffs by reason of the refusal of the court to permit their attorney to state to the jury the law of the case in the opening remarks.

* * * * *

Perceiving no material prejudicial error in the record, the judgment is affirmed.¹

¹To the same effect see *Maynard v. State*, (1908) 81 Nebr. 301, 116 N. W. 53.

PIETSCH V. PIETSCH.

*Supreme Court of Illinois. 1910.**245 Illinois, 454.*

MR. JUSTICE CARTWRIGHT delivered the opinion of the court:

This is a suit in forcible detainer for the possession of a lot in Chicago, begun by Charles F. Pietsch, the appellee, by filing his complaint in the municipal court of Chicago against Otto E. Pietsch and Helen Pietsch, appellants. After a jury had been empaneled and sworn the attorney for plaintiff made an opening statement of the case to the jury, to the effect that the defendants, who are husband and wife, had made a mortgage or trust deed on the lot, which was foreclosed; that a sale was made under the decree, from which there was no redemption; that a deed was made, in pursuance of the sale, to Charlotte L. Clark; that the prop-\$4,000 and a deed was made to him; that the defendants were in possession of the premises and refused to surrender possession after demand in writing; that the testimony might show there was some talk concerning an agreement that if the defendants would pay to the plaintiff the amount of money that was represented by his purchase of the property, with interest and costs, within a reasonable time, they might have the property and he would deed it to them; that if it should appear there was an agreement the plaintiff was still willing to perform it, but that he was claiming the possession of the property in the suit. An attorney for the defendants then stated to the jury, in substance, that the defendant Helen Pietsch, being the owner of the premises occupied by the defendants as their home, made a mortgage on the same, which was foreclosed; that about the time when the redemption would expire she went to the plaintiff, her brother-in-law, and wanted him to loan her the amount of the mortgage and permit her to remain there; that he let her have the money as a loan but said he would take the deed in his own name as security; that he put up something over \$4,000; that the matter ran along and she paid him back \$1,000 at one time, \$150 at another and afterward \$200 more; that it ran along for three or four years afterward,

and she had another piece of property upon which there was a mortgage of \$8,800 and he said he would loan her enough money to take that in. The attorney for the plaintiff objected to the statement relating to other property, and the attorney for the defendants said that he wanted to state to the jury that the plaintiff got his money back by means of a mortgage upon the other piece of property and this one, but the court sustained the objection and an exception was taken to the ruling. Continuing, the attorney stated that the amount was \$4,283.98 upon which payments had been made, and that it was agreed that Mrs. Pietsch should remain in possession of the premises and was entitled to remain there. The court then said, "I assume you have stated all of your defense," and the attorney replied, "Yes, sir," whereupon the court instructed the jury to return a verdict finding the defendants guilty of unlawfully withholding possession of the premises and that the right of possession was in the plaintiff. The jury returned a verdict accordingly, and the court, after overruling a motion for a new trial, entered judgment on the verdict. The Appellate Court for the First District affirmed the judgment and granted a certificate of importance and an appeal to this court.

When the jury had been sworn to try the issues and render a verdict according to the evidence it was the privilege of the attorney for each party, if he saw fit to do so, to make an opening statement of what he expected to prove. Such a statement is not intended to take the place of a declaration, complaint or other pleading, either as a statement of a legal cause of action or a legal defense, but is intended to advise the jury concerning the questions of fact involved, so as to prepare their minds for the evidence to be heard. How full it shall be made, within reasonable limits, is left to the discretion of the attorney, but the only purpose is to give the jury an idea of the nature of the action and defense. To relate the testimony at length will not be tolerated. (1 Thompson on Trials, 267.) A party is entitled to introduce evidence and prove a cause of action or to defend against evidence tending to sustain a cause of action if no statement at all is made, and is not confined in the introduction of evidence to the statement made in the opening, if one is made. The opening statement may be wrong as to

some facts, and there is no requirement that it shall give all the facts of the case, which may turn out to be different from the statement. The argument that a court may direct a verdict, not upon the evidence or the want of evidence but upon the statement of an attorney, rests mainly upon the power of an attorney to make admissions binding upon his client and to waive his rights. There is no dispute about the authority of an attorney to admit facts on the trial and waive the necessity of introducing evidence as to such facts, but the authorities cited relate to such admissions in the trial of the case. That the opening statement to the jury cannot be treated as an admission of facts binding upon the client was decided in *Lusk v. Throop*, 189 Ill. 127, where the refusal of an instruction that any statement made by the attorney for the plaintiffs in his opening statement, about what the evidence would show, was as binding upon the plaintiffs as if the plaintiffs themselves had made such statement, and as such should be considered by the jury in making their verdict, was endorsed by this court. If the jury could not treat statements of an attorney, in his opening statement, as to what the evidence would show as admissions of fact binding on the client and consider the same in making up their verdict, the same rule must necessarily be applied to the court, and it follows that there was no admission here of the cause of action or that there was no defense to it. Even if it could be said that the attorney admitted that the legal title to the lot was in the plaintiff and the title could not be tried in forcible detainer, there was no attempt to try the question of title. The title was not involved and could not be tried or determined, but it did not necessarily follow that the plaintiff was entitled to the possession of the property. The law in England is, that a court cannot take such action as was taken in this case upon an opening statement. In *Fletcher v. London and Northwestern Railway Co.*, 65 L. T. Rep. 605, the judge nonsuited the plaintiff on the ground that the opening statement did not show any cause of action, and it was held that the judge at the trial had no right to non-suit a plaintiff upon his counsel's opening statement without the consent of his counsel. It was pointed out that a suitor might lose his case because his counsel had omitted or mis-stated something in the opening, and the course adopted in that case

was condemned as most dangerous to the rights of litigants. The law is the same in Wisconsin. (*Fisher v. Fisher*, 5 Wis. 472; *Hadley v. Western Transit Co.*, 76 id. 344.) The same argument was made to the Wisconsin court that is made here,—that it would be convenient and conduce to the speedy administration of the law and justice to permit the court to decide the case upon an opening statement; but while that was conceded by the court, the practice was considered too dangerous to the rights of clients to be sanctioned. It is undoubtedly true that the method adopted in this case would be expeditious, and if there were no omissions or defects in the statement, and it was certain that the evidence would turn out in accordance with it, the court might be enabled to do justice; but it would be a still more expeditious method and equally conduce to the ends of justice for the court to call up the attorneys and examine them and decide the case on what they say before calling a jury, whereby much time, labor and expense would be saved. But if parties have a right to a trial by jury of the issues made by the pleadings, the verdict must rest upon evidence or want of evidence and not upon opening statements.

The decision chiefly relied upon in support of the ruling of the court was made in *Oscanyan v. Winchester Repeating Arms Co.*, 103 U. S. 261, but that was a case where the statement disclosed a contract that was void, as being corrupt in itself and prohibited by morality and public policy. The Statement was that the plaintiff sued for commissions on a sale of arms to the Turkish government, of which he was then consul general at the port of New York, and no court would entertain any action upon such a contract. Counsel for appellee is unable to perceive any difference between stating a corrupt cause of action contrary to public policy and good morals and failing to state a good cause of action or defense, but the difference is quite apparent. If a cause of action is such as no court would entertain, a court is bound to raise the question in the interest of due administration of justice and not for the benefit or in the interest of either party. Whether a claim of illegality is made by the pleadings or not, parties cannot compel a court to adjudicate upon alleged rights growing out of a contract void as against public policy or in violation of public law.

Wright v. Cudahy, 168 Ill. 86; *Crichfield v. Bermudez Asphalt Paving Co.*, 174 id. 466.

In this case the defendants had moved for a continuance for a limited time and urged as a ground that their remedy against the action was in equity and that they desired to proceed in a court of equity, but the continuance was denied and the grounds stated in support of the motion formed no basis for directing the verdict.

The judgments of the Appellate Court and the municipal court are reversed and the cause is remanded to the municipal court.

Reversed and remanded.

LINDLEY V. ATCHISON, TOPEKA & SANTA FE
RAILROAD COMPANY.

Supreme Court of Kansas. 1891.

47 Kansas, 432.

The opinion of the court was delivered by

JOHNSTON, J.: D. C. Lindley brought this action against the railroad company to recover damages for personal injuries alleged to have been sustained while traveling on a stock train. The first trial of the case resulted in a verdict in his favor, but proceedings in error were prosecuted, and the judgment of the district court was reversed, and the cause remanded for a new trial. (*Railroad Company v. Lindley*, 42 Kas. 714.) When the case was called for trial the second time, a jury was impaneled, after which the plaintiff by his counsel stated his case to the jury, and the evidence by which he expected to sustain it. He then offered in evidence a deposition which had been taken, when the defendant objected to the reading of the same, for the reason that the amended petition did not state facts sufficient to constitute a cause of action in favor of the plaintiff and against the defendant, and for the further reason that the statement made to the jury shows that the plaintiff was guilty of such contributory negligence as would preclude a recovery against the defendant. The objection was sus-

tained by the court, and the jury discharged. The plaintiff brings the case here upon a transcript of the record, asking a review and a reversal of the ruling of the district court.

The first question presented is, whether the court may dispose of the case upon the statement made by the plaintiff in opening his case. Such a statement is a part of the procedure of the trial. The code provides that, when the jury is sworn, the plaintiff or party who has the burden of proof may proceed to state his case to the jury, and the evidence by which he expects to sustain it. (Civil Code, § 275.) If the statements or admissions then made are such as to absolutely preclude a recovery, it would be useless to consume further time or to prolong the trial. The court is warranted in acting upon the admission of the parties the same as upon the testimony offered; and, as it may sustain a demurer to the evidence of the plaintiff and give judgment against him, it would seem that when he stated or admitted facts which were fatal to a recovery the court might close the case at once. The same question arose in like manner in *Oscanyan v. Arms Company*, 103 U. S. 251. Justice Field, who pronounced the judgment of the court, stated that—

“The power of the court to act in the disposition of a trial upon facts conceded by counsel is as plain as its power to act upon the evidence produced. The question in either case must be whether the facts upon which it is called to instruct the jury be clearly established. If a doubt exists as to the statement of counsel, the court will withhold its directions, as where the evidence is conflicting, and leave the matter to the determination of the jury. In the trial of a cause the admissions of counsel, as to matters to be proved, are constantly received and acted upon. They may dispense with proof of facts for which witnesses would otherwise be called. They may limit the demand made or the set-off claimed. Indeed, any fact bearing upon the issues involved, admitted by counsel, may be a ground of the court’s procedure, equally as if established by the clearest proof. And if, in the progress of a trial, either by such admission or proof, a fact is developed which must necessarily put an end to the action, the court may, upon its own motion, or that of counsel, act upon it and close the case.”

If the statement made to the court and jury by the plaintiff showed beyond dispute that the injuries which he received were the result of his own negligence, he could not recover anything from the defendant, and it would have been idle to have proceeded further with the trial of the cause. It is contended, it is true, that the statement made contained no fatal admission or any statements which justified the action of the court; but, unfortunately for the plaintiff, the statement is not found in the record. It might have been preserved by a bill of exceptions or in a case-made, but neither has been done. There appears to have been an attempt to make the statement a part of the record, as there is attached to what purports to be the statement a certificate made by the official stenographer of the district court. This certificate is unavailing. Such a statement can only be made a part of the record through a bill of exceptions settled and signed by the court, and it is not contended that this has been done. A certificate has been made by the judge that the statement appended to the record is a true and correct transcript of the same; but it is not the province of the judge to authenticate a transcript of record. If the court had allowed a bill of exceptions containing the statement, and made the same a part of the record, it would have been the province of the clerk, and not of the judge, to have authenticated a transcript of the same. It follows that the statement is not before us for consideration, and therefore the ruling and judgment of the district court must be affirmed.

All the Justices concurring.

REDDING V. PUGET SOUND IRON & STEEL WORKS.

Supreme Court of Washington. 1905.

36 Washington, 642.

RUDKIN, J.—This was an action brought by the widow and minor children to recover damages for the death of the husband and father, caused by the wrongful act of the defendant. After the jury was impaneled to try the cause in

the court below, the attorney representing the plaintiff made the opening statement of his case to the jury. Upon this statement the defendant moved the court to withdraw the case from the consideration of the jury, and to direct a judgment for the defendant. At the suggestion of the court, the motion was so amended as to include the pleadings, and, as thus amended, the motion was granted, the jury discharged, and a final judgment entered in favor of the defendant. The plaintiff appealed.

No reason is assigned in support of a judgment on the pleadings except that the complaint is defective and does not state facts sufficient to constitute a cause of action. The judgment rendered was a final judgment on the merits, and, if warranted at all, must find its support in the opening statement of counsel, and not in some defect in the complaint. The complaint alone, however deficient, would not justify or sustain a judgment on the merits such as was rendered by the court below. For this reason we will not consider or pass upon the sufficiency of the complaint, as the same may be amended after the case is remanded. It is unnecessary to set forth the opening statement of counsel in full. We deem it sufficient to say that the statement was most general in its character, and fell far short of stating facts sufficient to warrant a recovery against the respondent. Nothing was stated affirmatively, however, that would constitute a defense to the action or bar a recovery. When, then, is a court justified in taking a case from the jury and directing a judgment on the opening statement of counsel? That a party to an action is bound by admissions made by his attorney in the opening statement of his case, or at any stage of the trial, and that the court may act upon such admissions and direct a judgment in accordance therewith in a proper case is not disputed or denied. This is all that was decided in *Lindley v. Atchison etc. R. Co.*, 47 Kan. 432, 28 Pac. 201, and *Johnson v. Spokane*, 29 Wash. 730, 70 Pac. 122. In neither case was the opening statement upon which the trial court acted brought before the appellate court. *Oscanyan v. Arms Co.*, 103 U. S. 261, was an action on contract. It appeared from the opening statement of counsel that the contract in suit was against public policy and void, and the supreme court of the United States held that upon such a statement the

circuit court properly directed a verdict for the defendant. So, in any case, if it affirmatively appears from the opening statement of counsel that the contract in suit is void, or if facts are admitted which constitute a full and complete defense to the action, it would be idle for the court to proceed further with the trial.

But such is not the case here. Counsel stated too little, not too much. The court directed a judgment, not because the appellant was admitted out of court, but because the opening statement did not state facts sufficient to constitute a cause of action. Counsel may state their case as briefly or as generally as they see fit, and it is only when such statement shows affirmatively that there is no cause of action, or that there is a full and complete defense thereto, or when it is expressly admitted that the facts stated are the only facts which the party expects or intends to prove, that the court is warranted in acting upon it. The opening statement now before the court contained no admissions which would constitute a defense or defeat the action, and the omission of counsel to state the case more fully is no justification for the action of the court below in withdrawing the case from the jury.

The judgment is therefore reversed, and the cause remanded for new trial.¹

MOUNT, C. J., and FULLERTON, HADLEY, and DUNBAR, JJ., concur.

¹In *Jordan v. Reed*, (1908) 77 N. J. L. 584, 71 Atl. 280, it was held that to authorize a non-suit "the statement of counsel, by its omissions or admissions, must render it clearly evident either that no case can be made out or that a recovery is precluded."

In *Kelly v. Bergen County Gas Co.*, (1906) 74 N. J. L. 604, 67 Atl. 21, the court stated that "if objection be made to a statement too meagre to sustain the plaintiff's case, counsel will, doubtless, be permitted to enlarge his statement."

In *Hoffman House v. Foote*, (1902) 172 N. Y. 348, 65 N. E. 169, the court said: "The practice of disposing of cases upon the mere opening of counsel is generally a very unsafe method of deciding controversies, where there is or ever was anything to decide. It cannot be resorted to in many cases with justice to the parties, unless counsel stating the case to the jury deliberately and intentionally states or admits some fact that, in any view of the case, is fatal to the action."

CHAPTER VIII.

JUDGMENT ON THE PLEADINGS.

COBB V. WM. KENEFICK COMPANY.

Supreme Court of the State of Oklahoma. 1909.

23 Oklahoma, 440.

DUNN, J.—This action was begun in the United States court for the Western District of the Indian Territory, at Muskogee, by the Wm. Kenefick Company, defendant in error, against S. S. Cobb, City National Bank of Wagoner, Ind. T., First National Bank of Wagoner, Ind. T., W. B. Kane, and J. W. Wallace, to enforce payment of two notes given by S. S. Cobb to the said company to cover a subscription made by him to secure the construction of a railroad to the city of Wagoner under the terms and conditions as shown by the pleadings. A demurrer to the liability charged against the other parties named who signed the notes was sustained by the court, from which no appeal was prosecuted. Hence they are eliminated from the case, and we have but to deal with the controversy existing between the appellant Cobb and the appellee. On the filing of the amended answer, plaintiff filed a motion for judgment on the pleadings, which was sustained by the court, from which appeal was prosecuted to the United States Court of Appeals of the Indian Territory, and the case now comes to us for review by virtue of our succession to that court.

* * * * *

As a preliminary question, counsel for appellant in their brief contend that such a motion as was filed by appellee, for judgment on the pleadings, is unknown to our Code. While this is, strictly speaking, true, yet the practice is well established by the procedure adopted in the courts and meets nearly, if not quite, uniform approval. Black on Judgments, vol. 1, sec. 15; Ency. Pleading & Practice, vol.

11, pp. 1044, 1045; *Hutchison v. Myers*, 52 Kan. 290, 34 Pac. 742.

In the case of *Hutchinson v. Myers*, *supra*, Justice Johnston in the consideration thereof, speaking of the motion for judgment on the pleadings, has this to say:

"Complaint is next made of the action of the court in entertaining a motion for judgment upon the pleadings, and in allowing judgment against Hutchison without testimony. The motion for judgment on the pleadings was equivalent to a demurrer to Hutchison's answer, and is a common and permissible practice. If the averments of the petition were sufficient, and the answer did not allege a defense, and no amendment was asked for or allowed, plaintiff was certainly entitled to a judgment."

The general rule is stated in 23 Cyc. 769, as follows:

"This is a form of judgment not infrequently used in practice under the reformed Codes of Procedure. It is rendered on motion of plaintiff, when the answer admits or leaves undenied all the material facts stated in the complaint; but such a judgment cannot be given where the pleadings of defendant set up a substantial and issuable defense or where the suit is for unliquidated damages and the answer states matters in mitigation."

And, say the authorities, in the consideration thereof, "the pleadings objected to as insufficient will be liberally construed, and the motion will be denied, where there is any reasonable doubt as to their insufficiency." 11 Ency. of Pleading & Practice, 1047; *McAllister v. Welker*, 39 Minn. 535, 41 N. W. 107; *Kelley v. Rogers*, 21 Minn. 146; *Giles Lithographic & Liberty Printing Company v. Recamier Manufacturing Company*, 14 Daly (N. Y.), 475. In the case of *Malone et al. v. Minnesota Stone Company*, 36 Minn. 325, 31 N. W. 170, the court in the syllabus says: "Upon such motion every reasonable intendment is in favor of the sufficiency of the pleading objected to."

Now with this rule, requiring, as we have seen, the liberal construction of the answer filed in the case, the question arises: Does the complaint and the answer, taken together, considering those portions of the former admitted or undenied, in conjunction with the averments of the answer, leave the case in such a situation and present such a statement of facts as will justify an affirmance of this judg-

ment? This question will necessitate an analysis of the pleadings filed, to the end that we may ascertain the precise facts shown thereby. If the complaint states a cause of action which is undenied by the answer, and there is no new matter pleaded in the answer under the rule above noticed, sufficient to deny plaintiff the right to the relief demanded, then the judgment should be sustained; otherwise it should be reversed.

* * * * *

HOOVER V. HORN.

Supreme Court of Colorado. 1909.

45 Colorado, 288.

CHIEF JUSTICE STEELE delivered the opinion of the court:

The district court of Boulder County rendered judgment in favor of S. T. Horn and against Hoover and Keables, the defendants, upon a certain promissory note executed by Hoover and Keables and one Gearhart, dated August 4, 1904, and payable two months after date, to the order of Horn. The judgment was rendered on the pleadings.

The defendants' answer, aside from denials which were bad, one as being a negative pregnant, and the other as stating a legal conclusion, shows an attempt to plead two inconsistent defenses:

First, that the plaintiff, Horn, had, at the time the note sued on became due, a valid chattel mortgage upon property of the said Gearhart, of the value of five or six hundred dollars, and that he made no attempt to realize on such property; and,

Second, that, for the purpose of inducing the defendants to sign the said note with Gearhart, the said Horn falsely and fraudulently pretended to them that he had a good and valid chattel mortgage upon property of the said Gearhart, of the value of five or six hundred dollars; whereas, in truth and in fact, as the said Horn well knew, all the property originally covered by the chattel mortgage had, at that time, been removed from the county of Boulder by

the said Gearhart, and sold and disposed of; that the defendants believed said representations to be true, and were induced thereby to sign the said note as sureties for the said Gearhart, in consideration of an extension of two months, by Horn to Gearhart, of the term of said chattel mortgage.

The rule adopted by this court with reference to judgment upon the pleadings is thus stated in the case of *Mills et al. v. Hart*, 24 Colo. 505, wherein Mr. Justice Gabbert states: "As a general proposition, a motion for judgment on the pleadings, based on the facts thereby established, cannot be sustained, except where, under such facts, a judgment different from that pronounced could not be rendered; notwithstanding any evidence which might be produced (*Rice v. Bush*, 16 Colo. 484); or that such a motion cannot be sustained, unless, under the admitted facts, the moving party is entitled to judgment, without regard to what the findings might be on the facts upon which issue is joined; so that, in determining the rights of the defendants to the judgment given them, the real question to determine is, the sufficiency of the admitted facts to warrant the judgment rendered, and the materiality of those on which issue was joined." And, quoting from 9 Col. App. 211, Judge Gabbert further states: "A motion for judgment on the pleadings cannot prevail, unless, on the facts thereby established, the court, as a matter of law, can pronounce a judgment on the merits; that is, determine the rights of the parties to the subject matter of the controversy, and render a judgment in relation thereto which is final between the parties. Such a motion cannot, under the guise of a motion for judgment on the pleadings, be substituted for some other plea."

Upon a motion for judgment on the pleadings inconsistent defenses cannot be regarded as vitiating one another, but if any good defense is stated in the answer, it must be considered as true. The answer states that the owner of the note represented to these defendants that he held a chattel mortgage which was a first lien upon certain property of Gearhart, and that the property was of the value of five or six hundred dollars. The answer further alleges that they, believing these representations, agreed to become, and did become, sureties upon the note of Gearhart.

The answer further states that, at the time the said mortgage was given, all of the property mentioned therein had been removed from the county of Boulder, where the property was supposed to have been situated, and had been sold by said Gearhart, and that the plaintiff knew of such facts. These matters are perhaps not properly pleaded, and a motion to strike the answer because it contained but one defense and that defense contained several contradictory and inconsistent statements, might properly have been granted; but it was improper to grant a motion for judgment upon the pleadings. If the defendants were induced to become the sureties of Gearhart upon the statement of the holder of the mortgage that he had a valid first lien upon the property, when in truth and in fact there was no property of the mortgagor in that county upon which he had a lien, it deprived these sureties of the right to pay off the mortgage and become subrogated to the rights of the mortgagee.

The judgment will be reversed, and the cause remanded.

Reversed and remanded.

MR. JUSTICE GABBERT and MR. JUSTICE HILL, concur.

STERNBERG V. LEVY.

Supreme Court of Missouri. 1901.

159 Missouri, 617.

MARSHALL, J. * * * *

It is claimed that the motion for judgment on the pleadings is a demurrer, and hence is part of the record proper, and therefore no motion for new trial or bill of exceptions was necessary, but that the court will review the judgment upon the record, so constituted.

A motion for judgment on the pleadings is not a demurrer. It partakes of some of the qualities of a demurrer but it is not a demurrer, and hence it is not a part of the record. It is a matter of exception and can only be made a part of the record by a bill of exceptions.

It partakes of the nature of a demurrer, in that, it ad-

mits all facts that are well pleaded, and if it is overruled the order overruling it is not a final judgment from which an appeal will lie, but the party may plead over or proceed to trial on the issues joined. On the contrary, if it is sustained, judgment goes at once, whereas if a demurrer is sustained the order is not a final judgment, the party has a right to plead over, and it is only in case of refusal to plead over that final judgment can be rendered on demurrer.

There is no motion for judgment on the pleadings contained in this record. The bill of exceptions filed does not call for any such motion, and therefore there is no such question open to review in this case.

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CHAPTER IX.

DEMURRER TO THE EVIDENCE.

COPELAND V. NEW ENGLAND INSURANCE COMPANY.

Supreme Judicial Court of Massachusetts. 1839.

22 Pickering, 135.

This was assumpsit on a policy of insurance, whereby the defendants insured the sum of \$2,500 on the brig Adams, at and from Wilmington to Jamaica and at and from thence to her port of discharge in the United States. It was alleged, that the vessel was totally lost upon a coral reef near the Isle of Pines, while on her voyage from Jamaica to Wilmington.

Plea, the general issue.

The plaintiffs, in order to maintain the issue on their part, introduced the policy, the register of the vessel, the written abandonment of their interest, and the depositions of three witnesses, which had been taken on behalf of the defendants, detailing the circumstances attending the loss of the vessel. They also examined a witness *viva voce*, and his testimony was reduced to writing. The defendants, "confessing all said evidence to be true, and admitting every fact and every conclusion which the evidence thus given by the plaintiffs conduces to prove," say that the matters thus shown in evidence are not sufficient in law to maintain the issue on the part of the plaintiffs, and pray judgment that the jury may be discharged from giving any verdict upon such issue, and that the plaintiffs may be barred from having their action against them. The plaintiffs joined in the demurrer.

* * * * *

MORTON, J. delivered the opinion of the Court. This is assumpsit on a policy of insurance on the brig Adams. It is alleged, that the brig was totally lost upon a coral reef

near the Isle of Pines on the coast of Cuba. The admissions of the parties reduced the case to the simple question, whether the loss was caused by any of the perils insured against. To prove the affirmative the plaintiffs introduced the testimony of four witnesses, and here submitted their case. The defendants believing this evidence to be insufficient to support the action, demurred to it. The plaintiff joined in the demurrer; and the case has been argued upon the evidence thus brought before us.

This mode of trial is very unusual in this State. No case of the kind has happened since the commencement of our Reports; and it is believed that very few instances occurred before that time. But however unusual the resort to this mode of trial may be, it cannot be questioned, that the legal right to demur to evidence exists, under proper regulations and restrictions. However, as its purpose seems to be, to withdraw facts from the tribunal specially provided for their determination, it is no favorite of our system. And when the hazard and disadvantages which it imposes upon the party demurring, are duly considered, and the few cases to which it may properly apply are recollected, there will be no danger of its coming into common practice.

There are undoubtedly cases, though they are rare, in which a demurrer to evidence may be safely and properly taken. Where all the evidence in a case, consists of written instruments, and these are introduced by the party having the affirmative, his opponent may safely demur to the evidence, and be sure thereby to bring the merits of his case before the court. As it would be the province of the court to determine the construction and legal operation of the instruments, they would have, by the concession of the parties, all the materials necessary to enable them to determine the legal rights of the parties in the action. The facts being thus before them they, in applying the law to them, are in the exercise of their appropriate duty.

But a demurrer is not confined to written evidence. Where witnesses positively testify to certain definite facts, and there is no discrepancy between them, and no other evidence to be offered, a demurrer will properly bring these facts before the court, and enable them to judge whether

they will sustain the action or defence which they are introduced to support.

But it not infrequently happens, that the plaintiff or party having the affirmative, attempts to support the issue on his part by indirect and circumstantial evidence. And when the positions are to be established by inferences from many other facts, it is difficult, if not impracticable, to admit a demurrer.

It may be well here to consider the effect of a demurrer to evidence. And we shall do it with the more care, because we apprehend, that it was not duly considered or perfectly understood by the counsel on either side. It seems to have been supposed to be an admission of the truth of the evidence; and the Court have been called upon, supposing it all to be true, to determine what inferences may be drawn from it, and whether it would be competent for the jury upon it to find a verdict for the plaintiffs. And it has been argued, that if we would set aside a verdict found for the plaintiffs on this evidence, we must render judgment for the defendants, on the demurrer.

But we think this is a mistaken view of the subject and fails to give to the demurrer its legal effect. It leaves it to the court to draw inferences from the circumstances proved and to judge of the *weight* of the evidence; which would be trenching upon the province of the jury. The effect of a demurrer to evidence, is not only to admit the truth of the evidence, but the existence of all the facts which are stated in that evidence or which it conduces to prove. Hence that most acute and learned pleader, Mr Justice Gould, says, that this demurrer, "though called a demurrer to *evidence*, is essentially a demurrer to the *facts shown in evidence*." Gould on Pleading, 47, 48, 49. As a demurrer to a declaration asks the opinion of the court upon the facts properly pleaded, so a demurrer to evidence asks their opinion upon the facts shown in evidence. In both cases the decision is purely a matter of law, and cannot involve any questions of fact on the evidence.

The true question always raised by this kind of demurrer is, not what it is competent for the jury to find, but what the evidence *tends* to prove. This view is fully sustained by a most clear and elaborate opinion given by the very learned Lord Chief Justice Eyre, in pronouncing the judg-

ment of the House of Lords in the case of *Gibson v. Hunter*, 2 H. Blackstone, 187. This case contains a most lucid and able discussion of the whole subject. He says, the precise operation of a demurrer to evidence is, to take from the jury and refer to the judges the application of the law to the fact. In the nature of things the facts are first to be ascertained. Where the evidence is written or, if in parol, is positive, definite and certain, the party offering the evidence is bound to join in demurrer. But the reason of the rule "does not apply to parol evidence which is loose and indeterminate, which may be urged with more or less effect to a jury; and least of all will it apply to evidence of circumstances, which evidence is meant to operate beyond the proof of the existence of those circumstances, and to conduce to the proof of the existence of other facts. And yet if there be no demurrer in such cases, there will be no consistency in the doctrine of demurrers to evidence, by which the application of the law to the fact on an issue is meant to be withdrawn from a jury and transferred to the judges. If the party who demurs, will admit the evidence of the fact, the evidence of which fact is loose and indeterminate, or in the case of circumstantial evidence, if he will admit the existence of the fact, which the circumstances offered in evidence conduce to prove, there will then be no more variance, in this parol evidence, than in a matter in writing, and the reasons for compelling the party who offers the evidence to join in demurrer, will then apply, and the doctrine of demurrers to evidence will be uniform and consistent." See also *Middleton v. Baker*, Cro. Eliz. 753.

This doctrine seems to be founded upon and well supported by the case of *Wright v. Pindar*, reported in Style, 34, and also in Aleyn, 18. * * * *

The same principles are recognized by the Supreme Court of the United States, in *Young v. Black*, 7 Cranch, 565. Mr. Justice Story, in giving the judgment of the court, says, "the party demurring is bound to admit as true not only all the facts proved by the evidence introduced by the other party, but also all the facts which that evidence may legally conduce to prove."

* * * * *

In this case, *Fowle v. Common Council of Alexandria*, 11 Wheaton, 320, the learned judge says, "It is no part of the

object" of a demurrer to evidence "to bring before the court an investigation of the facts in dispute, or to *weigh* the force of testimony, or the presumptions arising from the evidence. That is the proper province of the jury. The true and proper object of such a demurrer is to refer to the court the law arising from the facts. It supposes, therefore, the facts to be already ascertained and admitted, and that nothing remains but for the court to apply the law to those facts."

Judge Gould expresses the same doctrine in a little different language. He says, § 47, "The object of a demurrer is to bring in question on the record, the *relevancy* of the evidence on one side, and to make the question of its *relevancy*, the sole point on which the issue in fact is to be determined." He adds, § 51, "that evidence is always relevant to any issue it conduces *in any degree* to prove. And as its relevancy is the only point of which the court can judge, it follows, that it can never be safe for a party to demur to evidence which is clearly *relevant* to the whole issue, viz. which clearly conduces *in any degree* to prove the whole affirmative side of the issue."

The result of these authorities is, that a demurrer to evidence admits not only all the facts directly stated in it, but also all the facts which the evidence in any degree *tends* to prove.

Where the evidence consists of written documents or of direct and positive testimony of witnesses, there can be no difficulty in demurring to it and of raising the question of law on the facts. But where the evidence is circumstantial or uncertain, leaving much to inference and presumption, it is not easy or safe to frame a demurrer upon it, or a rejoinder thereto. It will not be sufficient to demur to the evidence generally and leave the court to ascertain what it tends to prove, or what inferences may be drawn from it. But in reciting the evidence, in the demurrer, the party demurring must state distinctly the facts which the evidence tends to prove, and which he thereby admits, that the court may readily perceive the facts upon which they are to decide.

Judge Gould, adopting the language of Lord Chief Justice Eyre, says, "Where the evidence is circumstantial, the party demurring must distinctly admit upon the record

every fact and every conclusion, in favor of the opposite party, which the evidence conduces to prove; otherwise he is not bound to join in the demurrer, because without such admission the *weight* as well as the *relevancy* of the evidence would be referred to the court."

And Mr. Justice Story, in the case before cited, uses this language: "No party can insist upon the others joining in the demurrer, without distinctly admitting, upon the record, every fact and every conclusion, which the evidence conduces to prove." This is exactly the doctrine of *Gibson v. Hunter*.

Now in the case at bar, the defendants demur generally to evidence, which is circumstantial, loose and indeterminate. And so far from reciting the facts and conclusions which the evidence tends to prove, and which they intend to admit, they refer generally to all the evidence as it exists in the form of depositions, consisting of a great variety of interrogatories and cross interrogatories, and the answers to them, which are neither direct and positive nor consistent. This we think to be clearly irregular. To quote again the language of Judge Story, "The defendants have demurred, not to facts but to evidence of facts, not to admissions, but to mere circumstances of presumption."

The evidence offered in this case tends to show, and undoubtedly does show, that the brig insured, in a squall, (not a severe one to be sure,) ran upon a coral reef and was totally lost. This proof, by itself, clearly would support the plaintiffs' action. But the defendants contend that the testimony of the same witnesses tends to show, that the vessel was run on shore intentionally or through the gross incapacity of the master. Now these are distinct substantive facts, which the defendants wish to establish. It is true the evidence tends strongly, very strongly, to prove them. But the defendants cannot avail themselves of these grounds of defence on a demurrer to the evidence. If the plaintiff's evidence does not show a *prima facie* case, the defendants may demur. But if they wish to set up any facts in defence, they must resort to the jury to have them established. The depositions introduced by the plaintiffs were taken by the defendants, and thus the facts may be presented in an order and a form most favorable to the latter. The defendants too, by demurring, admit the facts

which the evidence conduces to prove for the plaintiffs, and cannot avail themselves of such as it tends to show for the defendants. The plaintiffs, by joining in the demurrer, did not admit the truth of that part of the testimony which is favorable to the defendants, much less any inferences which may be drawn from it. If the defendants wish to set up any facts to exonerate or discharge them, they must look to the jury to establish them. The Court cannot examine, compare and weigh the different parts of the evidence. It would be performing a duty which the law has not imposed upon them, and which they uniformly refuse to accept from the agreement of the parties themselves.

Without going into a further examination of the evidence, we are fully convinced that the demurrer was not properly tendered, that the evidence did not present a proper case for a demurrer, that the plaintiffs ought not to have joined in it, but to have prayed the judgment of the court whether the defendants should be admitted to it.

The Court have an important discretion in allowing or disallowing demurrers to evidence. Although a demurrer is a matter of right and the opposite party may be compelled to join in it, when properly presented, yet he should always be careful to see that it contains the proper admissions before he joins in it. On the whole, we are satisfied, that the demurrer was tendered and joined without fully examining and duly considering the nature and effect of the measure.

And we think, not as Lord Chief Justice Rolle said, "that both parties have misbehaved themselves," but in the language of the Supreme Court of the United States, "that the demurrer has been so incautiously framed, that there is no manner of certainty in the state of facts upon which any judgment can be founded. Under such a predicament, the settled practice, is to award a new trial, upon the ground that the issue between the parties has not been tried." This was done in the analogous cases of *Wright v. Pindar*, and *Gibson v. Hunter*, by the House of Lords, and in *Fowle v. Common Council of Alexandria*, by the Supreme Court of the United States.

Venire facias de novo awarded.

GALVESTON, HARRISBURG & SAN ANTONIO RAIL-
WAY COMPANY V. TEMPLETON.*Supreme Court of Texas. 1894.**87 Texas, 42.*

BROWN, ASSOCIATE JUSTICE.—Defendant in error, plaintiff below, brought this suit by petition filed August 1, 1891, in the District Court for the Forty-fifth Judicial District of Bexar county, to recover \$15,000 damages, alleged to have been sustained by him on or about August 20, 1890, at San Antonio, by reason of injuries received, while in the service of appellant and in the discharge of his duties as switchman, in attempting to mount a flat car on which was a defective brake, causing him to be thrown from the car, his right leg broken, and thereby made much shorter than the other, and rendering him a cripple for life, unable to perform manual labor. From the injury he charges that he suffered great physical pain and mental anguish.

* * * * *

There was a trial by jury. The plaintiff having closed his evidence, the defendant demurred thereto; upon which plaintiff joined issue, and the court overruled the demurrer and instructed the jury to find for the plaintiff the actual damages by him sustained, if any, as the only question left for their determination. There was a verdict and judgment in favor of plaintiff for \$4,600. Defendant made its motion for a new trial, which being overruled, it excepted thereto and in open court gave notice of appeal; and thereafter perfected its appeal by filing a supersedeas bond and an assignment of errors.

The Court of Civil Appeals affirmed the judgment of the District Court.

This case is presented to this court upon the following propositions and objections to the judgment of the District Court and the Court of Civil Appeals:

* * * * *

Third. That the Court of Civil Appeals erred in holding that upon overruling the defendant's demurrer to evidence the court below properly refused to submit the case to the

jury upon the evidence, to determine whether or not the plaintiff was entitled to a verdict.

* * * * *

The defendant having demurred to the evidence, and the plaintiff having joined in it, the case was as to the facts and the right of plaintiff to recover withdrawn from the jury, and must be decided by the court. *Booth v. Cotton*, 13 Texas, 362; *Tierney v. Frazier*, 57 Texas, 443; *Thornton v. Bank*, 3 Pet. 40; *Obaugh v. Finn*, 4 Ark. 110; 1 Tidd's Prac. 575.

If the damages claimed by plaintiff were liquidated, the court might decide the entire case, for in that event there would be no issue to submit to the jury. But when, as in this case, the damages claimed are unliquidated that question must be submitted to a jury to ascertain the amount. *Ins. Co. v. Lewis*, 1 So. Rep. 863; *Boyd v. Gilchrist*, 15 Ala. 856; *Young v. Foster*, 7 Port. (Ala.) 420; 1 Tidd's Prac. 575; 2 Id. 866.

When a demurrer to evidence has been presented and joined in by the opposite party, the court may submit the case to the jury to ascertain the damages before deciding upon the demurrer, and hold the verdict subject to decision on the demurrer. Or if the demurrer be decided before the jury then empanelled has been discharged, the court may submit the question of damages to the jury that heard the evidence. Or the court may, upon presentation of the demurrer, discharge the jury, and in case it be overruled empanel a new jury to assess the damages. 2 Tidd's Prac. 866; *Ins. Co. v. Lewis*, 1 So. Rep. 863; *Obaugh v. Finn*, 4 Ark. 110; *Young v. Foster*, 7 Port. (Ala.) 420; *Boyd v. Gilchrist*, 15 Ala. 856; *Humphreys v. West*, 3 Rand. 516.

It is the better practice, we think, to submit the question of damages to the jury that has heard the evidence, either before or after decision on the demurrer, by which delay and cost would be saved for the parties to the action. Whether it be submitted before or after the decision upon the demurrer can not be of importance nor work injury to either party. It was not error to submit the issue as to the amount of damages to the jury then empanelled, after the demurrer had been overruled.

Plaintiff in error claims that the court, after overruling its demurrer to the evidence, should have submitted the case

to the jury on the evidence as to the right of plaintiff to recover. This would be a most extraordinary result of a demurrer to evidence. By it defendant would, under that practice (if it were the practice in any court), withdraw the case from the jury as to the rights of the plaintiff, and in case the decision was favorable to the defendant, the plaintiff would be deprived of a trial by jury at the election of the defendant; but in case the court to which defendant appealed should decide against it, then it must be allowed that trial which it sought to avoid by the demurrer. It would have been error to have done what plaintiff in error claims the court should have done. It would have been contrary to the law, against reason, and against the right.

* * * * *

The judgments of the District Court and the Court of Civil Appeals are affirmed.

*Affirmed.*¹

¹*Comparison between Demurrer to Evidence and Motion for a Directed Verdict.* In *Eberstadt v. State*, (1898) 92 Tex. 94, 45 S. W. 1007, the court said: "The effect of the motion made by the defendants to instruct the jury to find for them has practically the same effect as a demurrer to the evidence in calling for the opinion of the court on the legal sufficiency of the proof, but it does not have the effect to withdraw the case from the jury. If a motion be overruled the trial must proceed as if it had not been made, and the court can not because the motion has been overruled instruct the jury to find for the plaintiff upon the ground that the motion admitted the truth of the evidence adduced. 2 *Thomp. on Trials*, sec. 2270, p. 1624; *Harris v. Woody*, 9 Mo. 113. The difference between the demurrer to the evidence and the motion to instruct a verdict for the defendant is technical, it is true, but it is still a practical difference, in this, that the defendant does not choose to withdraw his case from the jury and rely upon the testimony already introduced, but exercises his option of calling for the judgment of the court upon the strength of the plaintiff's case, with the privilege in case the decision is against him of proceeding to develop his defense to the plaintiff's action. Instead of moving the court to instruct the jury, the defendants might have presented a written instruction to that effect, and it being refused could have proceeded to introduce their testimony."

FRITZ V. CLARK.

Supreme Court of Indiana. 1881.

80 Indiana, 591.

BEST, C.—This action was brought by the appellees against the appellant to recover sixty-six acres of land in Howard county, Indiana. The complaint consisted of three

paragraphs. * * * An answer of three paragraphs was then filed. * * * A reply in denial was filed to the second paragraph of the answer, and the issues thus formed were submitted to a jury for trial. After the evidence on both sides had been heard, the appellees demurred to the evidence. The court withdrew the case from the jury, sustained the demurrer to the evidence, and rendered final judgment thereon for the appellees, to all of which the appellant duly excepted. A motion for a new trial was also made and overruled.

Various errors have been assigned in this court. Among others, it is insisted that the court erred in sustaining the appellees' demurrer to the evidence; and, as the conclusion reached by us upon this question is decisive of the case, the others will not be considered.

The appellant insists that the evidence of a party who demurs will not be considered upon such demurrer, and in the absence of the appellees' evidence the demurrer should have been overruled.

The question thus raised has not been, so far as we are informed, decided in this State. * * *

* * * * *

There are many cases in our reports where the defendant has demurred to the evidence of the plaintiff. The following are among them: *Lindley v. Kelley*, 42 Ind. 294; *Pinnell v. Stringer*, 59 Ind. 555; *Fouch v. Wilson*, 60 Ind. 64; *Newhouse v. Clark*, 60 Ind. 172; *Indianapolis, etc., R. W. Co. v. Goar*, 62 Ind. 411; *Miller v. Porter*, 71 Ind. 521; *Ohio, etc., R. W. Co. v. Collarn*, 73 Ind. 261.

There are some cases where the plaintiff has demurred to the evidence of the defendant, aside from those mentioned in the former part of this opinion, but in each of such cases the burthen of the issue was upon the defendant. The following cases are among them: *Strough v. Gear*, 48 Ind. 100; *Lemmon v. Whitman*, 75 Ind. 318.

In none of them, however, was the question here discussed involved, but all of them proceeded upon the familiar doctrine that the evidence of the party who joins in the demurrer must determine its sufficiency. Will the evidence of the party who tenders the demurrer be considered?

In *Hart v. Calloway*, 2 Bibb, 460, the defendant, after the evidence on both sides had been admitted, tendered a de-

murrer embracing the evidence of both parties, and the question was whether the plaintiff could be compelled to join in such demurrer. The court, in speaking of the nature of a demurrer to the evidence, said: "The demurrant, according to the established form, alleges that the matter shewn in evidence by his adversary, is not sufficient in law to maintain the issue on his part, and that he, the demurrant to the matters aforesaid, in form aforesaid shewn in evidence, hath not any necessity, nor is he obliged by the law of the land to answer, and concludes with a verification. * * * The party whose evidence is demurred to, in the joinder alleges that he hath shewn in evidence to the jury, sufficient matter to maintain the issue joined on his part, and for as much as the demurrant doth not deny nor in any manner answer the said matters, prays judgment. Thus is the issue joined between the parties, upon the question whether the matters shewn by the party whose evidence is demurred to, is sufficient in point of law to maintain the issue on his part. To this question the judgment of the court responds, either in the affirmative, that the matter shewn in evidence by him is sufficient, or in the negative that it is not sufficient."

In *Woodgate's Adm'r v. Threlkeld*, 3 Bibb. 527, the court upon a similar demurrer, said: "The defendant could not by demurring cause his own evidence to be taken for true, and the court can not, without usurping the province of the jury, decide upon its truth. In principle, it is not less absurd for a party to demur to his own evidence, than it would be to demur to his own plea; and it is believed that there is no precedent to be found in the English books for the former, no more than there is for the latter practice."

In *Fowle v. The Common Council of Alexandria*, 11 Wheat. 320, the court, upon a similar demurrer, where the evidence was circumstantial, said: "Even if the demurrer could be considered as being exclusively taken to the plaintiff's evidence, it ought not to have been allowed without a distinct admission of the facts which that evidence conduced to prove; but where the demurrer was so framed as to let in the defendants' evidence, and thus to rebut what the other side aimed to establish, and to overthrow the presumptions arising therefrom, by counter presumptions, it was the duty of the circuit court to overrule the demurrer,

as incorrect, and untenable in principle. The question referred by it to the court, was not a question of law, but of fact."

* * * * *

These cases abundantly show that the evidence of the demurrant will not be considered upon the demurrer, and, in the absence of authorities, it would seem impossible to reach any other conclusion. The demurrant attacks the evidence of his adversary, and, in the very nature of things, this attack can not be aided by his own evidence. The sufficiency of the adversary's evidence to support the issue upon his part is the only question presented by the demurrer, and this question must be determined without reference to the evidence of the demurring party; indeed, such party does not and can not have any evidence. The evidence of the adversary is alone involved in the issue raised by the demurrer. The cases of *Thomas v. Ruddell*, 66 Ind. 326, and *Baker v. Baker*, 69 Ind. 399, so far as they are inconsistent with this opinion, should be overruled.

As the evidence of the demurring party is not to be considered, the case stands precisely as though no evidence was offered by the appellees; and, as the burthen of the issue was upon them, the demurrer should have been overruled, and judgment rendered for the appellant. *Fouch v. Wilson*, 60 Ind. 64.

For these reasons, the judgment should be reversed.

BENNETT V. PERKINS.

Supreme Court of Appeals of West Virginia. 1900.

47 West Virginia, 425.

McWHORTER, President:

* * * * *

"Fourth. It was error for the court to require defendant to join in plaintiff's demurrer to the evidence," as set out in the bill of exceptions No. 4; and, fifth, "It was error to render judgment, on the demurrer to the evidence, for plaintiff." The contract sued upon here was for the pay-

ment to plaintiff of the sum of three hundred dollars in case he succeeded in relieving or releasing two certain tracts of land from the lien of a judgment which endangered it. If he was wholly successful he was to be paid the three hundred dollars, with interest, but, in the event he should fail to release both of said tracts from said lien, and should relieve from liability the one tract on which said defendant then lived, then he was to be paid the one-half of said sum. The burden of proof was upon the plaintiff to show to the satisfaction of the jury that he had performed his part of the contract, and was entitled to recover the three hundred dollars, or the one-half thereof, as the case might be. Counsel for plaintiff contend that either party may demur to the evidence, and cite *Insurance Co. v. Wilson*, 29 W. Va. 528, (2 S. E. 888); *Shaw v. County Court*, 30 W. Va. 488, (4 S. E. 439), and *Arnold v. Bunnell*, 42 W. Va. 479, (26 S. E. 359) in support of their contention, and this is true, with certain restrictions. 6 Enc. Pl. & Prac. 440, says: "Either party has a right to demur to the evidence, but the demurrer is only applicable to the evidence of the party holding the affirmative of the issue." In *Pickel v. Isgrigg*, (C. C.) 6 Fed. 676, it is held: "The evidence of a party upon the affirmative side of an issue of fact before a jury may be demurred to by the adverse party under certain conditions; but the party upon whom the burden of proof of the issue rests is not permitted to demur to the evidence of the other party, for he cannot be allowed to assume that he has made out his case." So, in *Styles v. Inman*, 55 Miss. 469, (Syl., point 8): "A demurrer may be taken to the evidence of either party, plaintiff or defendant, holding the affirmative of the issue." While it has not been held, in so many words, by this Court, that the evidence of the party not having the burden of proof cannot be demurred to, yet it has so held by implication. In *Bank v. Evans*, 9 W. Va. 373, (Syl., point 7): "The defendant ought to be compelled to join in a demurrer to evidence when the burden of proof is upon him, unless the case is clearly against the plaintiff, or the court doubts what facts should be reasonably inferred from the evidence." What is the plain inference here but that, if the burden of proof is not upon the defendant, he should not be required to join in the demurrer. To a jury of his

peers the defendant as well as the plaintiff has a right, under the Constitution of the United States, and of this State, to submit all questions of fact in issue in actions at law. Article VII. of the former instrument provides that: "In suits at common law, when the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law;" and our State Constitution (Article III., § 13) makes the same provision; and, when a defendant submits his facts in evidence before a jury impaneled to try the issue made in the case, and the same tend in any degree, however slight, to contradict plaintiff's evidence, or to prove failure on the part of plaintiff to comply with his contract, the right to have such evidence weighed and considered by the jury is guaranteed to him, and he cannot be deprived of this right by the court withdrawing the case from the jury, the constituted triors of the issues of fact, and itself weigh the evidence, and decide which party succeeds on the issue. If either party has an absolute right, whether the *onus probandi* was upon him or not, to demur to the evidence, and force his adversary to join therein, then the right of trial by jury is at an end, and that which has ever been held by the American people as one of their most sacred rights, is a myth. The rule is that he who affirms a proposition must maintain it with sufficient evidence. * * * The fifth assignment—that it was error to render judgment for the plaintiff on the demurrer to the evidence—is, therefore, well taken.

* * * * *

It follows that the judgment and the verdict of the jury should have been set aside, and the plaintiff's action dismissed.

Reversed.

HOPKINS V. RAILROAD.

*Supreme Court of Tennessee. 1895.**96 Tennessee, 409.*

McALISTER, J.—The only question presented for determination upon the record is whether the practice of demurring to the evidence is sanctioned by the Constitution and laws of this State. The suit was brought by W. D. Hopkins, Administrator, to recover damages for the unlawful killing of his son, W. O. Hopkins.

The plaintiff's intestate, at the time of his death, was employed by the railroad company in the capacity of fireman upon a locomotive. The gravamen of the action, as outlined in the declaration, is that the death of the plaintiff's intestate was occasioned by the negligence of the engineer in charge of the train. * * *

* * * * *

* * * The record discloses that the deceased, in obedience to the rules of the company, had voluntarily taken his position at the rear brake of the rear car; that, with knowledge of the signals, he gave a danger signal to the engineer, and the latter, in answer to said signal, immediately shut off steam, producing a jar in the train which threw the plaintiff from his position on the car violently to the ground. This was the proximate cause of the accident. * * * So that, in any view of the case, upon the plaintiff's own showing, no liability was made out against the company. It appears from the record that at the conclusion of the plaintiff's testimony before the jury, counsel for defendant company interposed a written demurrer to the evidence, as follows, to wit: "The defendant comes and demurs to the evidence of plaintiff, and offers to admit of record that the following testimony and proof introduced by the plaintiff (setting out all the testimony introduced by plaintiff) is true, and further admits as true all proper and legal deductions and inferences therefrom in law. The defendant offers to admit, that the facts so stated are the facts in the case, and were proven entirely by plaintiff and his witnesses, and does now aver that the facts so stated present no ground for a recovery against it under the pleadings in this cause, and this it is ready to verify.

Wherefore, defendant prays the Court to allow this demurrer, and direct plaintiff to join therein; and judgment of the Court accordingly; and that plaintiff may be barred against having or maintaining his action against it, or further prosecuting the same.

“East & Fogg,

“C. D. Porter,

“J. D. B. DeBow,

“Attorneys.”

It will be observed that the demurrer in this cause was in writing, and set out in full the plaintiff's evidence, which is in accordance with the established practice in such cases.

Counsel for plaintiff moved to dismiss the demurrer, because unknown to the forms or practice of the law, and because insufficient, which motion was by the Court overruled. Thereupon, plaintiff joined issue upon the demurrer. Upon argument of counsel and consideration by the Court the demurrer was sustained, and the suit dismissed. Plaintiff appealed, and has assigned errors.

The first assignment is that the trial Judge erred in allowing defendant to file a demurrer to the evidence, sustaining the same, and dismissing the suit. It is insisted this action of the Court violates Article 1, Section 6 of the Constitution of the State, which provides that the right of trial by jury shall remain inviolate, etc.; and also Article 6, Section 9, which ordains: “Judges shall not charge juries with respect to matters of fact, but may state the testimony and declare the law.” It may be well to understand at the threshold of this investigation what is meant by the right of trial by jury as guaranteed by the Constitution. The late Mr. Justice Miller, in his lectures on Constitutional Law, quotes, with approval, the following from the *Encyclopedia Britannica*, in its article “Jury,” to-wit: “The essential features of trial by jury, as practiced in England and countries influenced by English ideas, are the following: The jury are a body of laymen, selected by lot, to ascertain, under the guidance of a Judge, the truth in questions of fact, arising either in a civil litigation or a criminal process. * * * Their province is strictly limited to questions of fact, and, within that province, they are still further restricted to the exclusive consideration of

matters that have been proved by evidence in the course of the trial. They must submit to the direction of the Judge as to any rule or principal of law that may be applicable to the case," etc.

Again, Forsyth, in his History of Trial by Jury, published in 1852, says: "The distinctive characteristic of the system is this, that the jury consists of a body of men taken from the community at large, summoned to find the truth of disputed facts. They are to decide upon the effect of the evidence, and thus to assist the Court to pronounce a right judgment, but they have nothing to do with the judgment or sentence which follows the verdict. They are not, like the Judges, members of a class charged with the duty of judicial inquiry; they are taken from varied pursuits to make a special inquiry, and return to their ordinary avocations when this labor is over."

It will be observed that in both of these definitions the distinctive feature of the jury system is, that it is a tribunal erected for the settlement of variant, contested, and disputed facts. If the facts upon which the plaintiff relies are uncontroverted and are expressly admitted by the defendant, together with all legal and reasonable inferences that may be deduced therefrom, it is difficult to perceive what function is to be performed by the jury in the settlement of such agreed facts. The province of the jury is to weigh the evidence, but when there is no disputed facts in the record, there is nothing to be weighed. It was upon this idea that the demurrer to the evidence became an established practice at common law.

"It is defined by the best text writers to be a proceeding by which the Court in which the action is depending is called upon to decide what the law is upon the facts shown in evidence, and it is regarded, in general, as analogous to a demurrer upon the facts alleged in the pleading. When a party wishes to withdraw from the jury the application of the law to the facts, he may, by the consent of the Court, demur in law upon the evidence, the effect of which is to take from the jury and refer to the Court the application of the law to the facts; and thus the evidence is made a part of the record, and is considered by the Court as in the case of a special verdict." *Snydam v. Williamson*, 20 How. 427; *VanStone v. Stillwell Mfg. Co.*, 142 U. S. 134.

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“The demurrer not only admits the truth of all the evidence adduced by the party against whose evidence the demurrer is directed, but it also admits all the inferences that may be logically and reasonably drawn from the evidence. The probative force of the evidence is not confined to the direct effect of the evidence, but extends to the results reasonably deducible from it by logical and legitimate inference. * * * It follows, therefore, that the facts which the evidence, directly or indirectly, tends to prove must be taken as admitted.” Elliott’s General Practice, Vol. 2, Sec. 858.

* * * * *

We have seen from the authorities that the only province of the jury is to settle disputed questions of fact, while the office of the demurrer to the evidence is to admit the facts and invoke the application of the law by the Court. Is this practice in any sense an invasion of the constitutional guaranty “that the right of trial by jury shall remain inviolate,” or is it subversive of the other provision “that judges shall not charge juries with respect to matters of fact, but may state the testimony and declare the law?” We do not so understand it. It is not so understood in other States of the Union with similar constitutional provisions.

Says Mr. Elliott: “In some jurisdictions,” citing Maine, “the Courts refuse to recognize the practice of demurring to the evidence but, as we think, without reason, for the practice is an ancient and well established one, having a firm support in principle. It is recognized in most of the States, and also by the Federal and English Courts.” Vol. 2, Sec. 855.

“It is illogical,” says the same author, “to assert that that there is any encroachment upon the province of the jury where the evidence is conceded to be true, and all legitimate and reasonable inferences that may be drawn from it are admitted, for in such a case there is no disputed question for the jury to decide. Nor is there any injustice in entertaining a demurrer, for, if the law is against the party to whose evidence the demurrer is addressed upon the evidence and the legitimate inferences that may be drawn from it, he can by no possibility be rightfully entitled to a recovery, and it is the duty of the Court to so

adjudge." Elliott's General Practice, Vol. 2, Sec. 858.

* * * * *

It will thus be seen from this review that the demurrer to the evidence is still preserved in seventeen of the States. The practice has not been repudiated in the other States as obnoxious to their Constitutions, but it has been superseded by a less cumbersome and more radical procedure, to-wit, ordering a nonsuit and directing a verdict.

* * * * *

* * * It will be perceived, moreover, that in every State of the Union the Judge is allowed to withdraw a case from the jury whenever there is a destitution of any competent, relevant, and material evidence to support the issue, and this authority is exercised, either by directing a verdict, sustaining a demurrer to the evidence or enforcing a compulsory nonsuit, as the practice may prevail in the particular State. This fact is incontestable, and is abundantly shown in the overflow of cases already cited.

But it is argued by counsel for plaintiff in error that, whatever may be the practice in other States of the Union, the adjudications of this Court are against either form of practice, and necessarily so, since the Constitution of Tennessee not only secures the right of trial by jury, but further declares that "Judges shall not charge juries with respect to matters of fact, but may state the testimony and declare the law." As already seen, the first clause in respect of the trial by jury, is found in the Constitution of all the States in one form or another, but the latter clause is found in the organic law of only five States. We do not think the latter clause adds anything to the prohibition contained in the first clause.

* * * * *

It will be found that the practice in the five States whose Constitutions embody this additional clause sanctions either the compulsory nonsuit or the right of the Judge to direct a verdict, in either case confessedly a more radical procedure than the demurrer to the evidence.

* * * * *

We hold that an appropriate form for determining whether, as a matter of law, any recovery can be had, or liability fixed, against the defendant upon facts which are not disputed is by demurring to the evidence. This form

of practice is expressly sanctioned by an adjudication of this Court which has never been overruled, though it may be conceded that the practice is cumbersome and antiquated. In the nature of things, it can seldom be successfully invoked, for the reason that if, upon any rational or legitimate view of the evidence, a *prima facie* case is made out, "or if the testimony be doubtful, or the trend of facts contradictory in themselves, or admit of different interpretation by fair-minded men," the case must be submitted to the jury. Moreover, the practice is attended with the danger that, if unsuccessful, the prevailing party is entitled to final judgment and an immediate assessment of his damages. Elliott's General Practice, Vol. 2, Secs. 865-870.

In the present record we are confronted with a perfectly plain case, in which no liability is established against the defendant upon the facts, or upon any reasonable or legitimate inference that may be made upon such facts. The law of every case, in whatever form presented, belongs to the Court. It is not only the prerogative of the Judge, but a solemn duty to declare it.

The defendant in this case is entitled to the judgment of the law, upon the undisputed facts found in the record. Our duty is imperative, and, being of opinion that in no view of the facts shown in evidence is any liability made out against the defendant company, we affirm the judgment of the Circuit Court.

CHAPTER X.

DISMISSAL, NON-SUIT AND DIRECTED VERDICT.

SECTION 1. DISMISSAL.

(a) *Circumstances under which Plaintiff may Dismiss.*

BERTSCHY V. McLEOD.

Supreme Court of Wisconsin. 1873.

32 Wisconsin, 205.

Appeal from the County Court of Milwaukee County.

This action was brought to recover an alleged unpaid balance due from the defendant to the plaintiff for a steam engine and fixtures furnished by the plaintiff to defendant, pursuant to a written agreement between the parties, a copy of which is inserted in the complaint. The answer contains, in addition to certain matters pleaded as defenses, two counter-claims, one of which alleges that the written agreement does not contain the contract made by the parties and which they intended to include therein, in that an important portion of such contract is omitted therefrom, and prays that the written agreement be reformed so as to include the omitted portion; and the other counter-claim is for damages for the alleged failure of the plaintiff to perform such contract on his part, on account of which the defendant demands judgment against the plaintiff for a sum exceeding the demand of the plaintiff.

The plaintiff replied to such counter-claims, in effect denying the material allegations thereof. After issue was thus joined in the action, the attorney for the plaintiff entered a sidebar rule, or order of course, with the clerk of the court, discontinuing the action on payment of the defendant's taxable costs therein. He also, on the same day, served upon the attorneys for the defendant notice of such proceeding, and an offer to pay the defendant's costs upon presentation of a taxed bill thereof, and a further offer

to appear without formal notice before any taxing officer for the purpose of having the costs adjusted. The attorneys for the defendant immediately notified the plaintiff's attorney that they should disregard the attempted discontinuance of the action, for the reason that after a counterclaim had been interposed the action could only be discontinued by leave of court; and they accordingly noticed the cause for trial, and caused it to be placed on the calendar for trial at the next term of the court.

Thereupon a motion was made on behalf of the plaintiff, to strike the cause from the calendar, on the ground that the same had been discontinued. The court denied the motion, holding that the cause had not been legally discontinued, but was still pending. This appeal is from the order denying such motion.

* * * * *

LYON, J.

The following propositions must, we think, be conceded: 1st. At the common law, a plaintiff had the absolute right to discontinue his action before or after issue joined, and without leave of court. 2nd. In suits in equity, under the former practice, the plaintiff might, in like manner, dismiss his bill, but such dismissal did not carry with it a cross bill interposed by the defendant. 2 Barb. Ch. Pr., 128 and cases cited. 3d. The right of discontinuance is not effected by the code, but remains the same, both in legal and equitable actions, as under the former practice.

By the common law, neither of the counterclaims here interposed could be pleaded in the action. The one which demands a reformation of the written agreement could only be made available by a suit in equity; and the other, which demands judgment for damages for the alleged violation of his contract by the plaintiff, in excess of the plaintiff's demand, could only be enforced by a separate action. Of course, the subject matter of the latter counter-claim might be pleaded as a defense to the action, either in whole or in part; but the defendant could not in that case recover judgment for any excess of damages sustained by him, over and above the damages sustained by the plaintiff. In brief, at the common law the defendant could only plead such matter in defense, and could not obtain in the action equitable relief, or recover a judgment for damages against the plain-

tiff, as he now may under proper pleadings and proofs. Waterman on Set-Off, Recoupment, etc., 471; 1 Chitty's Pl., 569; 2 Black. Com. (Cooley's ed.), 305, note 19. Hence, all there was of the action at the common law was the cause of action as stated in the declaration, and the defense pleaded thereto by the defendant; and that was all which the plaintiff had an absolute right to discontinue. Such right of discontinuance still remains under the present practice, and, to the extent above indicated, has been rightfully exercised in this case by the plaintiff. The plaintiff's cause of action, and all defenses pleaded thereto which could have been pleaded as such under the former practice, have disappeared from the cause by force of the order of discontinuance.

But we are unable to perceive how it can be held, upon any logical principle, that such discontinuance necessarily carried with it those proceedings of the defendant which the code permits him to institute in the action, or rather to engraft upon it, but which are, in substance and effect, actions brought by the defendant against the plaintiff. Had these proceedings been under the common law practice, as already observed, the counter-claims interposed in this action would have been asserted in two separate and distinct actions, one at law and the other in equity, in both of which the position of the parties would be the reverse of their position in the present action. In such case, surely the discontinuance by the plaintiff of the action brought by him would not work a discontinuance of such other actions brought against him. Why should the plaintiff's discontinuance of his action lead to that result under the present practice? The learned counsel for the plaintiff have failed to answer this question satisfactorily, and we freely confess our inability to do so.

The cases decided by the various courts of New York upon the subject of the right of discontinuance under the code are conflicting, and quite unsatisfactory; and we can get but little aid from them in determining the question under consideration.

It may be stated, in support of the views above expressed, that this right or practice of counter-claim is borrowed from the civil law, where it is designated "demand in reconvention;" and the Louisiana cases referred to by the learned

counsel for the defendant clearly show that, by the rules of the civil law, a discontinuance of the action by the plaintiff is ineffectual to put a defendant out of court who has interposed a "demand in reconvention."

If the foregoing views are correct, it necessarily follows that the discontinuance of his action by the plaintiff left the issues made by the counter-claims and the reply thereto, pending in court and for trial, and that the court ruled correctly in refusing to strike the cause from the calendar. If application be made for that purpose, the county court should, under the special circumstances of the case, permit the plaintiff to vacate the order of discontinuance so entered by him, to the end that the whole controversy between the parties may be adjudicated in this action.

* * * * *

By the Court.—The order appealed from is affirmed.

CARLETON V. DARCY.

Court of Appeals of New York. 1878.

75 New York, 375.

FOLGER, J.

The plaintiff has seen fit to ask the court below for an order permitting him to discontinue his action, on the payment of costs to the defendants. That court has refused his request, and on appeal from the order he claims that he has the right, of his own head, to discontinue his action on those terms. But there is no valid discontinuance of an action without an order to that end. That order, whether *ex parte* or on motion, must be an order of the court, and as its order, within its control. It is true, as a general rule, that a plaintiff may, upon the payment of the costs of the defendant, enter an order of discontinuance of the action, and give notice thereof, and that the cause will be thereby discontinued. Yet the court has always kept and exercised the right to control such an order, as well as any other order put upon its records. And where circumstances have existed which have made it inequitable that

the plaintiff should, of his own head and without terms, discontinue his action, they have refused his motion to do so altogether, or except on terms; or when he has entered an order *ex parte*, have opened it, and made it conform to what was proper under the circumstances. Thus the order has been refused where a counter-claim had been set up, against which the statute of limitations would be a bar, if the suit was discontinued; (*Van Alen v. Schermerhorn*, 14 How. 287); or where the defendants had been examined as witnesses, unless the plaintiff would stipulate that the examination might be used in evidence in any action to be subsequently brought: *Cockle v. Underwood*, 3 Duer, 676; see, also, *Cooke v. Beach*, 25 How. 356.

So that the court, to which the motion for leave to discontinue was addressed, had a discretion, under all the circumstances of the case, whether or not to refuse it.

We do not think that it abused that discretion. The plaintiff had pursued his action of ejectment against a tenant, until the landlord had interposed and been made a defendant so that he might protect his own rights in the premises; the plaintiff had recovered judgment in his action of ejectment, and had been put in possession of the lands; the defendant had paid the costs and taken a new trial under the statute; and then the plaintiff, still in possession, asks leave of discontinue his action. He got the fruit of his action, the whole fruit of it, the possession of the premises. By a discontinuance of his action, he would turn the defendants about to an action of ejectment against him, and lay on them the burden of showing a valid title, sufficient to support the action against him. Had he preferred not only to give up the action, but the substantial fruits of it which he had got, and to put the defendants, or either of them, into the possession that he had taken from them, he might not be required to prosecute an action which he wished to end, and to further continue litigation. But it is quite different when he has got all that his action could give him, and has put the defendants to the need of that further litigation which the law allows them, to maintain what they think is their right, for him then to discontinue his action and throw the burden of the affirmation of another issue upon the defendants. The court might well require him to pursue the action that he had commenced,

until a definite and final result was reached in it, settling positively the right of possession of the lands in dispute.

We therefore think that the court below, in making the orders appealed from, did not abuse or exceed their discretion.

The appeal should be dismissed.

All concur.

Appeal dismissed.¹

¹The necessity for an order of the court dismissing an action, is sometimes dispensed with by statute. *Luse v. Luse*, (1909) 144 Ia. 396, 122 N. W. 970.

(b) *Time when Plaintiff may Dismiss.*

CARPENTER AND SONS COMPANY V. NEW YORK,
NEW HAVEN, AND HARTFORD RAILROAD
COMPANY.

GORHAM MANUFACTURING COMPANY V. SAME.

Supreme Judicial Court of Massachusetts. 1903.

184 Massachusetts, 98.

LORING, J.

It has always been a recognized principle of the English law, on the equity as well as on the common law side of the court, that a plaintiff is not bound to prosecute a suit or action to a finish because he has begun it. But on the contrary he is at liberty to abandon it without losing the right of action on which it is founded, and he can enforce that right subsequently on paying the costs of the former proceeding. In this respect a plaintiff is more fortunate than a defendant who has a day in court to interpose his defence if he would not have final judgment given against him.

What is not so clear is how far the plaintiff's proceeding (whether it be a suit in equity or an action on the common law side of the court) must have gone for it to have reached the stage where this right of abandonment is lost.

In England the plaintiff originally had a right to abandon an action at law and become nonsuit at any time before

verdict, if not before judgment. *Derick v. Taylor*, 171 Mass. 444, 445. That it was before verdict and not before judgment is laid down in *Outhwaite v. Hudson*, 7 Exch. 380, 381; 2 Tidd's Practice, (3d Am. ed.) 867. This rule was adopted here by an ordinance of the Colony in 1641; Anc. Chart. 46; and in *Locke v. Wood*, 16 Mass. 317, it was contended by Webster and Shaw in 1820 that that was the rule of practice of the Commonwealth and that the plaintiff had a right to become nonsuit at any time before judgment. But the court "were of opinion that there was no such right; and that, after a cause is opened to the jury, and begun to be proceeded in before them, the parties are entitled to a verdict, unless the court should, in its discretion, allow a nonsuit or discontinuance." Since then it has been held or said to be the rule that a plaintiff can become nonsuit as of right at any time before the trial has begun but not afterwards. *Means v. Welles*, 12 Met. 356, 361; *Lowell v. Merrimack Manuf. Co.*, 11 Gray, 382; *Shaw v. Boland*, 15 Gray, 571; *Truro v. Atkins*, 122 Mass. 418; *Burbank v. Woodward*, 124 Mass. 357; *Kempton v. Burgess*, 136 Mass. 192; *Derick v. Taylor*, 171 Mass. 444; *Worcester v. Lakeside Manuf. Co.*, 174 Mass. 299. See also the previous case of *Haskell v. Whitney*, 12 Mass. 47.

The reason for denying in this Commonwealth the rule of the English common law was the injustice done to the defendant, who was subjected to being harassed a second time on one and the same cause of action on receiving costs, which in this Commonwealth are nominal. In that respect the burden of being subject to a second action is much greater here than in England, where costs are substantial. But the common law rule has now been abolished in England. By Order XXVI. of the Rules of the Supreme Court, 1883, adopted under the judicature act, it is provided that "the plaintiff may, at any time before receipt of the defendant's defence, or after the receipt thereof before taking any other proceeding in the action (save any interlocutory application), by notice in writing" discontinue the action. *Wilson's Practice of the Supreme Court of Judicature*, (7th ed.) 234.

The Massachusetts rule as to when a plaintiff could become nonsuit in a common law action was established when substantially, if not absolutely, all such cases were

tried to a jury. No question could arise as to what the rule was when applied to cases tried by the court, as so many cases are now tried since Sts. 1874, c. 248, sec. 1; 1875, c. 212, sec. 1; 1894, c. 357, now R. L. c. 173, sec. 56, directing all cases to be tried by the court unless a trial by jury is claimed by one of the parties. Until the case is opened the right to become nonsuit exists.

A question did arise as to the application of the rule in case of a preliminary trial before commissioners in case of a petition to recover compensation for property taken under the right of eminent domain. It was held that when the hearing before the commissioners was begun the right to become nonsuit was lost. *Worcester v. Lakeside Manuf. Co.*, 174 Mass. 299.

The case as bar presents the question whether the right is lost when a hearing before an auditor has been finished but before the auditor's report is filed.

* * * * *

Were the question now before us a question of first impression depending entirely on the advantages and disadvantages to the plaintiff and the defendant respectively, it is by no means clear that it ought not to be held to be too late for a plaintiff to become nonsuit when an order had been made sending the case to an auditor. A hearing before an auditor is not now, as it was, a preliminary investigation of complicated accounts and nothing more. The rule laid down in *Whitwell v. Willard*, 1 Met. 216, was altered by St. 1856, c. 202, now R. L. c. 165, sec. 55. Although this rule was altered so long ago, it was not until lately that the practice as to what cases should be sent to an auditor was changed. It has become the practice now, however, (owing to the overcrowding of the dockets), to send to auditors cases involving a long investigation, no matter what the kind of investigation may be. The result is that an auditor's hearing is now a different thing from what it was. Not only that, but this change has been recognized by the Legislature. St. 1900, c. 418, (R. L. c. 165, sec. 59; c. 173, sec. 81), provides that the court may set a day for the "trial" before the auditor, and upon such order being made the trial shall proceed from day to day until it is concluded; that the actual engagement of counsel in a hearing before an auditor shall be an excuse in another

cause as if he were engaged in court, and each party is required to proceed before the auditor at the time appointed and "to produce in good faith, the testimony relied upon by him."

But in spite of the character which auditor's hearings have now assumed, it is still true that such hearings result in evidence merely and cannot result in an adjudication; and we are of opinion that a hearing which results in evidence and cannot *per se* result in an adjudication is not a trial within the rule which has now been laid down for over eighty years, namely, that a plaintiff can become nonsuit at any time before the trial begins and not afterward. Moreover this seems to have been assumed by the Legislature in this very statute, St. 1900, c. 418 (R. L. c. 165, sec. 59, and c. 173, sec. 81.) It is there provided that if the plaintiff does not comply with the provisions of the act and attend before the auditor, or if he refuses in good faith to put in the testimony relied on by him, the court is authorized to direct him to become nonsuit. In making that provision it is assumed that the court has no power to enter judgment for the defendant at that stage of the proceeding.

Under these circumstances, we do not feel at liberty to dispose of the question on its merits. If, under the practice which now obtains, the rule, which we feel we are bound by, does injustice to defendants, the remedy is with the Legislature.

Entry of nonsuit to stand.

OPPENHEIMER V. ELMORE.

Supreme Court of Iowa. 1899.

109 Iowa, 196.

DEEMER, J.

The record discloses that after the issues were made up, the jury impaneled and sworn, and the plaintiff's evidence adduced, the defendant submitted a motion asking the court to direct a verdict for him; and that after the court had indicated that he would sustain the motion, but before any

entry was made on the docket or any direction in fact given to the jury, the plaintiffs asked the court to dismiss their case without prejudice, which it refused to do, but, on the contrary, instructed the jury to return a verdict for defendant, which was accordingly done, and a judgment was thereafter rendered thereon. Section 3764 of the Code is as follows: "An action may be dismissed, and such dismissal shall be without prejudice to a future action, before the final submission of the case to the jury." What, then, is the submission of a case to a jury? That question seems to be answered by *Harris v. Beam*, 46 Iowa, 118, wherein it is said: "In every case finally submitted there must be some moment of time in which the condition of being finally submitted is assumed. Ordinarily, there is no difficulty in determining whether or not a case has been submitted. If the last word of the court's charge to the jury had not been read, it would probably be conceded that no final submission had occurred but, as the charge had been fully read, it is claimed nothing further remained for court or counsel to do, and that the case was finally in the hands of the jury. A cause is not finally submitted to a jury when the last word of the charge is read. In practice, the jury are directed by the court to retire in charge of a sworn officer to consider their verdict, or to enter upon the consideration of the case without retiring. This direction by the court to the jury, to enter upon the consideration of the case, may be fairly regarded as the moment when the final submission of the case occurs. An attorney cannot always tell whether he can safely submit his case to the jury on the evidence introduced until he hears the charge of the court. If, in his judgment, the charge is so adverse to him that he cannot safely trust his case in the hands of a jury, he ought at the moment to be permitted to dismiss without prejudice to future action." *Morrissey v. Railway Co.*, 80 Iowa, 314, is a case almost directly in point, and it is there said: "Plaintiff having produced all his evidence, and rested, the defendant made a motion to instruct the jury to find for the defendant; which being fully submitted, the court said that he thought the motion ought to be sustained, and indicated that he would sustain it, but had not yet made the entry on the calendar, nor directed for the defendant." "The plaintiff's attorney then asked leave to dismiss, to which the

defendant objected, on the ground that the case had been submitted to the court, which objection was overruled and the case dismissed." This action of the court was assigned as error. In passing upon this question, we said: "A submission is final only when nothing remains to be done to render it complete. Submission to a jury is not final until the last words of a charge are read, and the jury directed to consider their verdict. *Harris v. Beam*, 46 Iowa, 118. There was no final submission of this case to the jury. They had not received the charge of the court, and as yet had no authority to consider of or return a verdict. Appellant contends that, as the sustaining of the motion for verdict was, in effect, a final disposal of the case, there was a final submission of the case to the court before the plaintiff asked leave to dismiss. Surely, the submission of the motion was not a submission of the case to the court; for, whether the motion was overruled or sustained, it remained to submit the case to a jury for a verdict. There was no final submission of the case to the court or jury." See, also, *Partridge v. Wilsey*, 8 Iowa, 459; *Livingston v. McDonald*, 21 Iowa, 175; *Hays v. Turner*, 23 Iowa, 214. Nothing at variance with the rule established by these cases is announced in *McArthur v. Schultz*, 78 Iowa, 264. In that case there was a final submission, with an attempted reservation of a right to dismiss without prejudice. Such practice was condemned, and the action of the trial court in permitting a dismissal was reversed. Defendant's counsel have cited a number of cases from the supreme court of Kansas holding that the action of the trial court under such a statute is discretionary, and will not be interfered with on appeal. We have adopted a different rule, and, as it is a rule of practice, our own decisions must govern. The trial court should have permitted a dismissal of the case and its order and judgment are *Reversed*.

ASHMEAD V. ASHMEAD.

*Supreme Court of Kansas. 1880.**23 Kansas, 262.*

BREWER, J.

This was an action for divorce. After the testimony had been received, and the case taken under advisement, the plaintiff moved the court for leave to dismiss her action without prejudice. Defendant objected, and insisted that judgment be rendered upon the merits, but the court sustained the motion, and permitted the plaintiff to dismiss without prejudice. Was this error? We have not before us the testimony upon which the court acted in sustaining this motion. We must therefore presume it sufficient, if the court had the power to grant such a motion. It will be conceded that after the final submission of the case, the plaintiff had no right to a dismissal without prejudice. Up to that time she had such right, and could exercise it of her own option, without the consent of the defendant or the permission of the court. At that time her rights in that respect ceased. But has not the court the power in its discretion to permit a plaintiff, even after the final submission, to recall that submission and dismiss without prejudice? It would be both strange and harsh, if such power did not exist. Oftentimes, by some oversight or forgetfulness, the plaintiff omits some essential portion of his testimony. Is the court powerless to afford him relief? It is constant practice to open a case for additional testimony. Even after a jury has retired to consider of its verdict, the court may recall it, and open the case for future evidence. All this, it is true, rests within the discretion of the court, and is not a right of the party. Here the court exercised its discretion, and we cannot say that there was any abuse of such discretion. The case of *Schafer v. Weaver*, 20 Kas. 295, is in point. The question there arose, it is true, after a demurrer to the evidence had been sustained, but the principle is the same.

The judgment will be affirmed.

All the Justices concurring.

(c) *Effect of Dismissal.*

SOUTHERN RAILWAY COMPANY V. MILLER.

*Supreme Court of the United States. 1909.**217 United States, 209.*

MR. JUSTICE DAY delivered the opinion of the court.

The defendant in error, plaintiff below, brought suit in the City Court of Hall county, Georgia, against the Southern Railway Company, a corporation of Virginia, and certain individual citizens of Georgia, to recover damages for personal injuries received by him while in the employ of the railroad company as an engineer. A recovery in the court of original jurisdiction was affirmed in the Court of Appeals of Georgia (59 S. E. Rep. 1115), and the case is brought here to review certain Federal questions presented by the record. These are, first, that the state court erred in refusing to remove the case to the United States Circuit Court upon the petition of the plaintiff in error; second, as it appeared that the case had once been removed to the Federal court and was dismissed by the plaintiff, the state court should have held that the right to further prosecute in that court was lost, and the jurisdiction completely and finally transferred to the Federal court.

* * * * *

* * * There was no error in the refusal to remove the case.

A further objection is made that inasmuch as the suit was once removed from the state court to the Federal court and therein dismissed, there was no right to begin the case again in the state court. This argument is predicated upon the statement in a number of cases in this court, to the effect that where the petition for removal and bond has been filed the state court loses jurisdiction of the case, and subsequent proceedings therein are void and of no effect. But this is far from holding that a Federal court obtains jurisdiction of a suit thus removed in such wise that it can never again be brought in a state court, although there has been no judgment upon the merits in the Federal court, and the case has been dismissed therein without any other

disposition than is involved in a voluntary dismissal with the consent of the court.

While it is true that a compliance with the act of Congress entitling the party to remove the case may operate to end the jurisdiction of the state court, notwithstanding it refuses to allow such removal, it by no means follows that the state court may not acquire jurisdiction in some proper way of the same cause of action after the case has been dismissed without final judgment in a Federal court. By complying with the removal act the state court lost its jurisdiction, and upon the filing of the record in the Federal court that court acquired jurisdiction. It thereby had the authority to hear, determine and render a judgment in that case to the exclusion of every other court. But where the court permitted a dismissal of the action by the plaintiff it thereby lost the jurisdiction which it had thus acquired.

We know of no principle which would permit the Federal court under such circumstances, and after the dismissal of the suit, to continue its jurisdiction over the case in such wise that no other court could ever entertain it. After the voluntary dismissal in the Federal court the case was again at large, and the plaintiff was at liberty to begin it again in any court of competent jurisdiction.

We find no error in the judgment of the Court of Appeals of Georgia, and the same is affirmed.

Affirmed.

FRANCISCO V. CHICAGO & ALTON RAILWAY
COMPANY.

*United States Circuit Court of Appeals, Eighth Cir-
cuit. 1906.*

79 Circuit Court of Appeals, 292.

Before SANBORN, HOOK and ADAMS, Circuit Judges.
SANBORN, Circuit Judge.

The plaintiff below is the plaintiff in error here. He brought an action against the defendant to recover \$5,000 damages for the negligent killing of George L. Gerew. The

defendant denied its liability. There was a trial of the issues before a jury. At the close of the evidence the defendant moved the court to instruct the jury that under the pleadings and evidence they must find a verdict for the defendant. The court granted the motion, and the plaintiff excepted. But before the jury were actually instructed the plaintiff prayed leave of the court to take an involuntary nonsuit. The court granted him permission and a judgment was rendered accordingly. Subsequently the plaintiff moved the court to set aside this judgment of nonsuit and to grant a new trial of the action, and this motion was denied. He has sued out this writ of error to secure a reversal of this judgment of nonsuit on account of numerous alleged errors in the trial of the action, and especially because the court held that the evidence was insufficient to sustain his cause of action and that the defendant was entitled to a verdict thereon.

But invited error is irremediable. If the court erred in the rendition of the judgment of nonsuit, it erred at the plaintiff's request and to the prejudice of the defendant, and that error can form no ground for the reversal of the judgment at the suit of the plaintiff who procured it. A judgment of nonsuit upon the motion or request of the defendant and against the objection or protest of the plaintiff is reviewable by writ of error. *Central Transp. Co. v. Pullman's Car Co.*, 139 U. S. 24, 29, 39, 40, 11 Sup. Ct. 478, 35 L. Ed. 55; *Mechan v. Valentine*, 145 U. S. 611, 614, 618, 12 Sup. Ct. 972, 36 L. Ed. 835.

But a judgment of nonsuit on the motion, at the request or with the consent of the plaintiff, is not reviewable by writ of error at his suit, because he is estopped from convicting the trial court of an error which he requested it to commit. * * *

* * * * *

In *Parks v. Southern Ry. Co.*, 143 Fed. 276, a case which arose in North Carolina, where, in the state courts, a plaintiff may take a nonsuit at any time before verdict, the defendant at the close of the evidence had moved the court to instruct the jury to return a verdict in his favor, and the court had sustained the motion. Plaintiff then moved for leave to take a nonsuit. The court denied his motion and instructed the jury to return a verdict for the defendant.

The Circuit Court of Appeals held that, when the motion to instruct the jury for the defendant was made, the plaintiff was put to his election to then take his nonsuit or to submit the whole case upon the motion to instruct, that the motion for leave to take a nonsuit after the decision upon the motion to instruct came too late, and that there was no error in the subsequent refusal of the court to grant the nonsuit. While a different rule has been established in this circuit in cases coming from Missouri, in deference to a statute of that state and in conformity to the practice in its trial courts (*Chicago, M. & St. P. Ry. Co. v. Metalstaff*, 41 C. C. A. 669, 101 Fed. 769), the opinion in the Parks case contains a statement of the duty of courts to respect the rights of defendants, as well as plaintiffs, to a lawsuit, to make an end of litigation and to prevent the abuse of the means of administering justice by the trial of experiments upon the courts with defective causes of action, which strongly appeals to our judgment and presents a persuasive argument in support of the rule under consideration. Judge Pritchard said:

“It is highly important that the court in the exercise of its discretion should not only see that equal and exact justice is done between litigants, but it is equally important that needless litigation should be speedily determined, and in the trial of cases the court should consider the rights of the defendant as well as those of the plaintiff, and, where it appears that all the evidence which it is possible to obtain has been offered and the case has been submitted to the jury or to the court, it is the duty of the court, if in its opinion the evidence is not sufficient to justify a verdict in favor of the plaintiff, to direct the jury to return a verdict in favor of the defendant. The courts are not organized for the purpose of permitting the plaintiff in an action to experiment with a certain state of facts for the purpose of ascertaining the opinion of the court as to the law applicable to the same and then permit him to withdraw from the scene of conflict and state a new cause of action and mend his licks in another direction. Such policy, if adopted, would be productive of much mischief, and should not be tolerated.”

The difference between a judgment upon an instructed verdict and a judgment of nonsuit is that the former pre

vents, while the latter permits, the maintenance of another action for the same cause. When the evidence was closed in the suit before us, each party had established rights in the trial of this action. The plaintiff had the right to elect whether he would take a nonsuit (section 639, Rev. St. Mo. 1899; *Chicago, M. & St. P. Ry. Co. v. Metalstaff*, 41 C. C. A. 669, 101 Fed. 769), or would submit the whole cause upon the motion to instruct and endeavor to secure a verdict in his favor. The defendant had a right to elect whether it would endeavor to obtain a nonsuit or a verdict on the merits in its favor. It chose the latter alternative and moved the court for a directed verdict. This motion the plaintiff opposed and submitted the cause to the court for decision. The court granted the motion, and the plaintiff excepted. He then had the right to elect whether he would take a nonsuit and bring another action on the same cause, or would take a verdict against himself and secure a review of the rulings of the court by a writ of error. He chose the former remedy. He moved the court for leave to take an involuntary nonsuit. The parties then stood in this situation: The defendant asked and pressed for an instructed verdict and thereby necessarily objected to the nonsuit which gave the plaintiff an opportunity to bring another action. The plaintiff prayed for the nonsuit and thereby necessarily objected to the instructed verdict and to a judgment which would prevent his maintenance of another action. The court granted the request of the plaintiff and denied that of the defendant. Plaintiff thereby secured his right to maintain his action for the same cause, and the defendant lost the judgment in its favor and the entire benefit of a trial in which it had succeeded. The nonsuit was obtained by the act and request of the plaintiff against the motion and objection of the defendant, and it may not be successfully challenged by a writ of error procured by the former.

It is said that this was an involuntary nonsuit because the plaintiff was forced to take it by the decision of the trial court that he had proved no cause of action, and that the Supreme Court of Missouri has often so decided and has reviewed cases from the inferior courts of that state upon writs of error to such judgments. *Williams v. Finks*, 156 Mo. 597, 57 S. W. 732; *Ready v. Smith*, 141 Mo. 305, 42

S. W. 727; *English v. Mullanphy*, 1 Mo. 780; *Collins v. Bowmer*, 2 Mo. 195; *Bates County v. Smith*, 65 Mo. 464; *Schulter's Adm'r v. Bockwinkle's Adm'r*, 19 Mo. 647; *Dumey v. Schoeffler*, 20 Mo. 323; *Greene Co. v. Gray*, 146 Mo. 568, 48 S. W. 447. The answer is (1) that whether the nonsuit was voluntary or involuntary in the conception of the Supreme Court of Missouri, and whether or not it would have been reviewable by that court, if it had been granted by an inferior court of that state, an indispensable condition of its review at the instance of a plaintiff in error in a national court is that it was granted "without his consent and against his objection," and this judgment lacks this condition, for the nonsuit was granted at his request and by his active procurement; (2) that the plaintiff was not forced by the decision of the court below that he had failed to prove his case to take a nonsuit, but he had the option to take the verdict and judgment against him and to review it, and if it was erroneous to reverse it by writ of error, or to take the dismissal of the action and try again; and (3) that his choice of the latter alternative cannot be made involuntary by placing that deceptive adjective before it in the face of the record that he was free to proceed to verdict, judgment, and review, or to a judgment of nonsuit, and that of his own free will and against the motion and objection of his opponent he asked and secured the dismissal. The real character of this nonsuit cannot be reversed or concealed by applying to it a false epithet.

* * * * *

It has been a fixed rule of practice of the appellate courts of the United States for almost 100 years that no writ of error will lie at the suit of a plaintiff to review a judgment of nonsuit which has been rendered at his request or with his consent, and that no judgment will be reversed for an error which the plaintiff in the writ has invited the court to commit, and the fact that the Supreme Court of Missouri calls such a nonsuit "involuntary" and reviews it presents no persuasive reason why one of the national appellate courts should depart from this salutary rule while there are many why it should abide by and enforce it. Courts are established and maintained to settle and terminate controversies between citizens and to enforce their rights, not to furnish debating societies for the trial of legal experiments.

The chief reason of their being is to end, not to perpetuate, disputes. "*Interest reipublicae ut sit finis litium.*" A practice which permits a plaintiff to experiment with the courts and to harass the defendant interminably at will runs counter to the basic purpose of legal tribunals and of all civilized governments, and, instead of assisting to wisely administer justice, it inflicts and perpetuates wrong. Yet this is the practice which a grave review of such nonsuits as that in hand would establish. Under it a plaintiff could introduce his evidence and try the Circuit Court to see whether or not it would sustain his action. If it granted a motion to instruct a verdict against him, he could procure from the court an involuntary nonsuit, then sue out a writ of error and try the appellate court, and, if it would not sustain his action, he could pay the costs, bring another action for the same cause, and continue his actions and experiments interminably. The federal courts ought not to permit themselves to be made the subjects of such experiments. The only material interests involved in the review of such judgments are the costs of the actions, for the plaintiffs may try their causes again whatever the decisions of the appellate courts, and the demands upon these courts for the decision of real and important issues are too grave and pressing to permit them to devote their time to litigation so frivolous.

There is a more compelling reason why proceedings of this nature should not be sustained. The plaintiff is not the only party to a lawsuit who has rights. The defendant has some, and one of them is the right, not only to a fair and impartial trial of the action against him, but to a final adjudication of the alleged cause which the plaintiff presents and to a termination of the litigation upon it. This right he can never enforce, this termination he can never secure under the practice here proposed, for there is no limit to the number of actions on the same cause, or on the want of it, which the plaintiff may bring, review, and dismiss under it.

The conclusion is that a writ of error will not lie in a national appellate court at the suit of the plaintiff to review a judgment of nonsuit or dismissal which has been rendered at his request or with his consent after the court

has held at the close of the trial that the defendant is entitled to a verdict.

This case has been considered and determined upon the theory that the evident intention of the plaintiff and of the court to render a judgment of nonsuit has been effected. But the form of the judgment is such that a claim may be made that it was a judgment on the merits. For this reason alone the judgment will be reversed, the defendant in error will recover its costs in this court, and the case will be remanded to the Circuit Court, with directions to render a judgment that the action be dismissed without prejudice to the right of the plaintiff to maintain another for the same cause, and that the defendant recover its costs of the plaintiff, and it is so ordered.

(d) *Form of Motion.*

FERGUSON V. INGLE.

Supreme Court of Oregon. 1900.

38 Oregon, 43.

MR. JUSTICE MOORE, after stating the facts, delivered the opinion of the court.

1. It is contended by plaintiff's counsel that the court erred in refusing to grant a voluntary nonsuit requested by their clients; while defendant's counsel insist that, the motion therefor not having specified the ground upon which it was predicated, no error was committed in this respect. Considering these questions in inverse order, the rule is well settled that the motion of an adverse party for a nonsuit must specify the grounds therefor, and, unless it does so, an appellate court will not review the action of the trial court in denying the motion: 14 Enc. Pl. & Prac. 117, 136; *Silva v. Holland*, 74 Cal. 530 (16 Pac. 385); *Flynn v. Dougherty*, 91 Cal. 669 (27 Pac. 1080, 14 L. R. A. 230); *Wright v. Fire Ins. Co.*, 12 Mont. 474 (31 Pac. 87, 19 L. R. A. 211.) The reason for this rule is found in the fact that an appellate court will consider only such questions as have been

presented to the trial court at the proper time, and in an appropriate manner; and when it appears that the question sought to be reviewed was not thus submitted to such court the presumption that its decision thereon is correct ought to prevail. But, whatever reason may be adduced for the existence of this rule, the point insisted upon is without merit, for the motion in this case was not made by the adverse party. The statute provides, in effect, that the plaintiff, upon his own motion, may secure a judgment of nonsuit at any time before trial, unless a counter-claim has been pleaded as a defense. Hill's Ann. Laws, sec. 246. A voluntary nonsuit is, therefore, peremptory, and, whatever motive may have prompted a plaintiff to dismiss his suit or action, he is not required to state it; for if the motion be made before trial, and in the absence of a counter-claim pleaded as a defense, the trial court is without discretion in the matter, and must give the judgment requested.

* * * * *

The judgment is therefore reversed, and the cause remanded, with instructions to grant the nonsuit.

Reversed.

SECTION 2. NONSUIT.

CARROLL V. GRANDE RONDE ELECTRIC COMPANY.

Supreme Court of Oregon. 1907.

49 Oregon, 477.

Statement by MR. CHIEF JUSTICE BEAN.

This is an action by Eliza Carroll, administratrix, against the Grande Ronde Electric Co. On August 28, 1905, Leonard Carroll was killed by an electric wire belonging to defendant company. The administratrix of his estate brought an action to recover damages on account of his death, alleging that it was caused by the negligence of defendant. The defendant answered, denying the allegations of the complaint, and, for a further and separate defense,

setting up contributory negligence on the part of deceased. The trial was begun before a jury on issues joined, and, after the plaintiff had introduced her testimony and rested, the defendant moved for a nonsuit, on the ground, among others, that the evidence showed that the death of her intestate was caused by his own negligence. This motion was allowed; the record of such allowance reciting "that the plaintiff's intestate Leonard Carroll, at the time of the accident complained of, resulting in his death, was guilty of contributory negligence, which was the proximate and direct cause of the injury resulting in his death." The judgment was subsequently affirmed: *Carroll v. Grande Ronde Elec. Co.*, 47 Or. 424, (84 Pac. 389; 6 L. R. A., N. S. 290). Thereafter the plaintiff commenced this action on the same cause as is alleged in the action heretofore referred to. The defendant pleads the judgment in the former action as a bar, and, such plea being sustained, judgment was rendered in its favor, and plaintiff appeals.

Reversed.

Opinion by MR. CHIEF JUSTICE BEAN.

The statute, after providing that a judgment of nonsuit may be given against the plaintiff on motion of the defendant, when upon the trial the plaintiff fails to prove a cause sufficient to be submitted to the jury (Section 182, B. & C. Comp.), declares that, when such judgment is given, the action is dismissed, but it shall not have the effect to bar another action for the same cause: Section 184, B. & C. Comp. The statute would seem to leave no room for argument as to the effect of an involuntary judgment of nonsuit. But the defendant contends that because, in the case at bar, the entry of the order sustaining the motion contains a statement or finding that the contributory negligence of the plaintiff's intestate was the proximate cause of his death, it is a judgment on the merits, and therefore a bar to another action. The vice of this position lies in the fact that, on a motion for a nonsuit, the court has no jurisdiction or authority to pass upon the merits or adjudicate the rights of the parties, and an attempt to do so is a nullity. A motion by defendant for a nonsuit does not challenge the facts as shown by plaintiff, nor call upon the

court to determine the rights of the parties, but only to decide as a matter of law whether upon the evidence of plaintiff, as it now stands, he is entitled to take the opinion of the jury on his case. It is a motion based on some defect or neglect of the plaintiff, and does not involve the merits. The plaintiff, therefore, is, under all the authorities, authorized, if the motion is sustained to bring his action again: Black, Judgments (2 ed.), sec. 699; Freeman, Judgments, sec. 261; *Reynolds v. Garner*, 66 Barb. 319; *Lindvall v. Woods*, (C. C.), 47 Fed. 195; *Manhattan Life Ins. Co. v. Broughten*, 109 U. S. 121 (3 Sup. Ct. 99, 27 L. Ed. 878); *United States v. Parker*, 120 U. S. 89 (7 Sup. Ct. 454, 30 L. Ed. 601); *Gardner v. Michigan Cent. R. Co.*, 150 U. S. 349 (14 Sup. Ct. 140, 37 L. Ed. 1107). And it can make no difference upon what point the motion is allowed, or how the judgment may be framed, or what recitals it may contain, or that the motion was ordered upon the failure of plaintiff's evidence: 23 Cyc. 1137; 24 Am. & Eng. Enc. Law (2 ed.), 801; Black, Judgments (2 ed.), sec. 699; *Gummer v. Trustees of Village*, 50 Wis. 247 (6 N. W. 885); *United States v. Parker*, 120 U. S. 89 (7 Sup. Ct. 454, 30 Law. Ed. 601). It is still nothing but a judgment of nonsuit, which has been likened to the blowing out of a candle, which a man, at his own pleasure, may light again, and which the statute declares shall not be a bar to another action for the same cause. At the time the motion was made by the defendant, the plaintiff, on her own motion, could have taken a voluntary nonsuit, which certainly would not have been a bar, and she is in no worse position because the court on motion of defendant did what she herself voluntarily could have done. The defendant could have had a judgment which would have been a bar to another action if it had rested, and submitted the case to the jury on plaintiff's evidence, instead of moving for a nonsuit, but it has no right to experiment with a motion for a nonsuit, thus reserving to itself the right, if the ruling is against it, to go into a full trial on the merits, and deny the plaintiff, if she is the losing party, the right to bring her action anew. If the defendant would not be bound by the ruling on the motion, the plaintiff ought not to be. If a judgment of nonsuit, on the motion of defendant, is an adjudication upon the merits, conclusive on the plaintiff.

and a bar to another action, then the correlative rule must be adopted, that a denial of such motion is conclusive upon the defendant, and operates as a judgment for the plaintiff, a position nowhere asserted. No judgment can be an estoppel unless it is on the merits: Freeman, Judgments, sec. 260. And a motion for a nonsuit is a waiver of the right to have a judgment on the merits, and submits to the court the single question whether the plaintiff has proven a case sufficient to be submitted to a jury, and the sustaining or overruling of the motion is an adjudication of no other matter. The case of *Bartelt v. Seehorn*, 25 Wash. 261 (65 Pac. 185), seems to be contra to this conclusion, but no authorities are cited in its support, and we have been unable to find any, and the rule there announced is against the plain provisions of our statute.

Judgment reversed, and cause remanded for such other proceedings as may be proper, not inconsistent with this decision.

Reversed.

SMALLEY V. RIO GRANDE WESTERN RAILWAY COMPANY.

Supreme Court of Utah. 1908.

34 Utah, 423.

STRAUP, J.

This action was brought by the plaintiff to recover damages alleged to have been sustained by him by reason of the defendant's negligence. The accident happened in the defendant's railroad yard at Ogden. It was alleged in the complaint that the yard was located between two streets in a well-settled portion of the city; that in the vicinity of the accident it had been the custom of the public to cross the yard and walk along the tracks, and of children to play about the yard and ride on cars, with the knowledge and consent of the defendant; that the yard and cars operated therein were alluring and attractive to young children, who

were attracted to the yard and tempted to ride on cars; that it was the duty of the defendant to fence the yard, and in switching cars to have a sufficient number of men engaged at such work to perform it with reasonable safety to those who might be in and about the yard, and to have persons stationed on the cars to control their movements and to observe proper lookout for the presence of children about the tracks; that the defendant negligently failed to perform such duties, by reason of which the plaintiff, a boy five years of age, who had been attracted to the yard and at play on or about the tracks, was run against and injured by a car moved and switched about the yard. The defendant denied the negligence charged in the complaint, and alleged that the plaintiff unlawfully, and without the knowledge and consent of the defendant, entered the yard and while trespassing therein attempted, without the defendant's knowledge and consent, to board a moving car, which was being switched about the yard, and in so doing fell and was injured without fault on the part of the defendant, and that the custodian of the plaintiff, in whose charge the child had been placed by its father, was guilty of negligence in permitting it to wander about and to enter the yard. The case was tried to the court and jury.

* * * * *

* * * At the conclusion of the evidence the court, on the defendant's motion, directed the jury to render a verdict, "in favor of the defendant, no cause of action." The jury rendered a verdict, finding "the issues joined in favor of the defendant, and against the plaintiff, no cause of action." A judgment was entered on the merits in favor of the defendant, from which this appeal is prosecuted by plaintiff.

It is contended by appellant that, though the evidence was not sufficient to let the case to the jury, the court nevertheless was not authorized to direct a verdict and enter a judgment on merits, as was done. This claim is made upon the following statutory provisions (section 3181, Comp. Laws 1907): "An action may be dismissed or a judgment of nonsuit entered in the following cases: (1) By the plaintiff himself at any time before trial, upon the payment of costs, if a counter-claim has not been made, or affirmative relief sought by the answer of the defendant, etc. (2) By

either party upon the written consent of the other. (3) By the court when the plaintiff fails to appear on the trial, and the defendant appears and asks for the dismissal. (4) By the court when upon the trial and before the final submission of the case the plaintiff abandons it. (5) By the court upon motion of the defendant, when upon the trial the plaintiff fails to prove a sufficient case for the jury; provided, that the offering of evidence after the overruling of a motion for a nonsuit shall not be deemed or considered a waiver of the exception taken by the defendant to the order overruling such motion. (6) By the court when after verdict or final submission the party entitled to judgment neglects to demand and have the same entered for more than six months." Section 3182: "In every case, other than those mentioned in the next preceding section, judgment must be rendered on the merits." By reason of these provisions, especially subdivision 5 of section 3181, it is argued that the direction of a verdict in favor of the defendant, when the plaintiff fails to prove a sufficient case for the jury, can have no greater effect than the granting of a motion of nonsuit. * * *

* * * * *

In some respects the principles applying to a motion of nonsuit also apply to a motion for a direction of a verdict. In a general sense it may be said that both take the place of a demurrer to the evidence and are governed by the same principles. But a demurrer to the evidence was a submission of the case for final determination, which determination called for a judgment on the merits. Our Code has provided under what circumstances a motion of nonsuit may be granted, and that the granting of such a motion shall not be an adjudication on merits, nor shall the overruling of such a motion preclude the moving party from thereafter offering evidence, as was the case on a demurrer to evidence. The court may, at the close of plaintiff's evidence, on plaintiff's motion, grant a voluntary, and on the defendant's motion an involuntary, nonsuit. The court may do the same thing at the close of all the evidence, and before the case has been submitted for final determination. In each of such cases the judgment is not on the merits. The plaintiff, however, at the close of his evidence may rest and submit the case for final determination. The defend-

ant may do likewise without offering any evidence. So, too, at the close of all the evidence offered by both parties, the plaintiff may still submit the case for final determination, as also may the defendant. Whenever a party "rests" his case, he indicates that he has produced all the evidence he intends to offer, and submits the case, either finally, or subject to his right to afterwards offer rebutting evidence. When both parties have "rested," they indicate a submission of the case for final determination. The determination on such a submission is on the merits. If the facts are in dispute, the case must be sent to the jury for their finding, upon which a judgment on merits is entered accordingly. If the facts are not in dispute, the determination presents a mere question of law, to be decided by the court, upon whose decision, or upon the rendition of a verdict directed by him, a judgment is also entered on the merits. Upon a final submission of the case, when there is no evidence to sustain the case of the party having the affirmative, it is proper for the court to direct a verdict against him. It is as proper for the court to direct a verdict against the plaintiff, in the absence of proof to establish a fact essential to his case, as to direct a verdict against him when the proof, either upon his own evidence or that of the defendant, conclusively establishes some affirmative defense. We do not understand the statute to mean that the court is authorized to direct a verdict in the one instance, but not in the other, or that the court is unauthorized to direct a verdict in any case. In the case in hand, upon the evidence adduced by both parties, the case was submitted for final determination without the making of a motion of nonsuit or dismissal by either party. Upon such a submission the defendant urged that the facts were not in dispute, and that, on the established facts, it, as matter of law, was entitled to a judgment in its favor. On the other hand, the plaintiff urged that the facts were in dispute, and that the question of the defendant's negligence was one of fact, and not of law, and hence the determination of the case required a finding by the jury. In such case the determination, whether made by the court as matter of law, or by the jury as matter of fact, called for a judgment on the merits. We are therefore of the opinion that the court was fully authorized to direct such a verdict and to enter such a judg-

ment. Whether the ruling was erroneous remains to be considered.

It is urged that the court erred in directing a verdict because no grounds were stated for such action. This court has repeatedly held that the particular grounds upon which a motion for nonsuit is based must be stated in order that the attention of the court and counsel may be called thereto, and that the defects in the proof may be obviated and corrected, if such defects admit of correction. *Frank v. Bullion-Beck, etc., M. Co.*, 19 Utah, 35, 56 Pac. 419; *Skeen v. O. S. L. R. R. Co.*, 22 Utah, 413, 62 Pac. 1020; *Lewis v. Mining Co.*, 22 Utah, 51, 61 Pac. 860; *Wild v. Union Pac. Ry. Co.*, 23 Utah, 266, 63 Pac. 886, and other cases there cited. From the above cases it will be seen that a judgment of nonsuit in a number of them was reversed because the grounds upon which the motion was based were not sufficiently specified, regardless of the question of the sufficiency of the evidence to send the case to the jury. The general rule, when a motion is denied or an objection overruled, the moving party is permitted, on appeal, to urge only such grounds for a reversal as were specifically pointed out or made by him before the trial court, but when the motion or objection is sustained, because of the presumption against error coming to his aid, a party is permitted, on appeal, to defend the ruling on any ground inhering in the record, was, either in effect or expressly, held, in a number of cases in this jurisdiction, not applicable to a motion of nonsuit. In the case of *White v. Rio Grande Western Ry. Co.*, 22 Utah, 138, 61 Pac. 568, it was expressly decided that there is no difference with respect to the rule requiring a specification of grounds when the motion is denied and when the motion is sustained. In *McIntyre v. Ajax Min. Co.*, 20 Utah, 332, 60 Pac. 552, this court held that "an appellate court will not sustain a motion for nonsuit, except on the grounds alleged in the motion," and approvingly quoted the syllabus, in the case of *Palmer v. Marysville Dem. Pub. Co.*, 90 Cal. 168, 27 Pac. 21 that "It is error for the trial court to grant a nonsuit, unless the grounds therefor are called to the attention of the trial judge and the plaintiff at the time the motion is made; and, where none of the grounds upon which the nonsuit is asked are sufficient to warrant the court in granting the

motion, the order granting it will be reversed, although another ground, not specified in the motion, might have warranted the order."

We think the reasons given by courts, requiring the grounds upon which a motion for nonsuit is based to be specified, in order that the court may know upon what question of law the case is asked to be taken from the jury, and the party against whom the motion is directed may be afforded opportunity to correct the defects, if they admit of correction, and can be obviated by additional evidence, apply with equal force to a motion for a direction of a verdict. If such opportunity should be afforded him on a motion of nonsuit, which, if granted, would not be an adjudication on the merits, and not a bar to another action, for much stronger reasons should such opportunity be given him on a motion for a direction of a verdict, which, if granted, would be a bar to another action. * * *

* * * * *

* * * In the case of *Tandercup v. Hansen*, 8 S. D. 375, 66 N. W. 1073, it was said:

"Where such a motion is made, the specific ground upon which the motion is made must be stated. It is due to the court and the opposing counsel, that their attention should be called to the precise defect in the evidence, or the omission of evidence, that the party claims entitles him to the direction of the verdict. It is due to the court to enable it to pass understandingly upon the motion, and it is due to counsel that he may, if possible, supply the defective or omitted evidence if permitted to do so by the court."

The same doctrine is stated in 6 Pl. & Pr. 699, in the following language:

"The motion to direct a verdict, and the judge in making such direction, should specify the particular ground or grounds which justify it."

We have not been referred to, nor have we seen, any case holding to the contrary. This, however, does not mean that the *movant* of the motion or the court is required to state reasons supporting the grounds. If the grounds are sufficiently specified to call attention to the particular defects and the question of law on which the case is taken from the jury, that is all that is required. A mere general statement that, under the evidence, the plaintiff is not

entitled to recover, or that the defendant is entitled to a verdict, or that the plaintiff has not made a sufficient case to go to the jury, does not point to anything. If, however, in a case of negligence a specification is made that the evidence is insufficient to show negligence on the part of the defendant, or that under the evidence the plaintiff is conclusively shown to be guilty of contributory negligence, or that he assumed the risk, etc., such a specification is ordinarily sufficient. If a verdict is directed on the ground that the evidence is insufficient to show negligence on the part of the defendant, it sufficiently is made to appear on what question of law the case was taken from the jury. The making of such a specification ordinarily points out the defect within the meaning of the adjudicated cases. The court in such instance may give reasons why in his opinion the evidence is insufficient to show such negligence. Though the reasons given may be groundless, yet, if upon an examination of the record the evidence is found insufficient to show such negligence, the ruling must be upheld. The rule is also qualified to the extent that, if it is otherwise made manifest upon what question of law the case was taken from the jury, and the defects upon which it was based do not admit of correction, or could not have been cured had direct attention been called thereto, a failure to specify grounds will not reverse the ruling. *Daley v. Russ*, 86 Cal. 114, 24 Pac. 867; *Fontana v. Pac. Can. Co.*, 129 Cal. 51, 61 Pac. 580. It may, however, be urged that a request to direct a verdict is a request to charge, and that a party submitting requests is not required to state reasons or grounds in support of them. But a request to direct a verdict is not a request to charge the jury. It is, in effect, a motion to take the case from their consideration. When a verdict is directed by the court, the jury is bound to render the verdict as directed. In such instance the court alone determines the case, and there is no occasion to instruct or charge the jury in respect of the law applicable to the case.

With these observations we now proceed to the question in hand. At the conclusion of all the evidence, and after both parties had rested, counsel for the defendant stated: "I now move the court to instruct the jury to return a verdict in favor of the defendant, no cause of action; and,

in view of the elaborate discussion that has been had, I am not inclined to argue it, unless the court desires to hear further upon some particular question from us. If counsel cares to argue it, I will reply to any suggestions that he may have." It must be conceded that the motion itself specifies no grounds, and were that all that was made to appear, it would be very doubtful whether the question of law upon which the verdict was asked to be directed was sufficiently indicated. Counsel for plaintiff in reply to the suggestion stated that he did not care to argue questions which had already been argued. As disclosed by the record, the questions referred to involved the doctrine of the "turntable" cases, and its application to the facts in the case. Counsel for plaintiff further stated that, under all the circumstances of the case, whether the employees of the defendant exercised due care in the premises was a question of fact for the jury, and urged that the evidence was conflicting as to whether the child caught hold of the car, or whether it was injured in some other way. The court then observed that, if counsel desired to take the position that there was such a conflict, he would exclude the jury and permit counsel to argue it. The jury was thereupon excluded, and the matter then discussed by counsel for plaintiff. In that connection he also discussed the question, and took the position that the employees were guilty of negligence in not anticipating the return of the child, and in failing to discover it after it had returned to the yard. At the conclusion of plaintiff's discussion, the court indicated that he did not care to hear from counsel for the defendant, and stated that, in his opinion, the evidence without dispute, showed that the plaintiff attempted to get on the car, or was riding on the car, at the time the injury was inflicted, and that, under the circumstances, he was not entitled to recover. The jury was thereupon recalled, and directed to return a verdict for the defendant. The particulars upon which the verdict was directed were theretofore called to the attention of counsel, and the question of law upon which the verdict was directed sufficiently indicated. If the defects were curable, plaintiff was in the same position to cure them as though the motion itself had specified the grounds.

This, then, brings us to the further point, made by the

appellant, that the evidence was sufficient to send the case to the jury on the question of the defendant's negligence.

* * * * *

In this case the presence of the plaintiff and his companion, on their first visit to the yard, was discovered by the defendant's employees. Instead of remaining passive and inactive, the employees took sufficient affirmative action in the premises to cause the removal of the children. In obedience to the direction given them they left the yard and entered upon adjoining premises, and disappeared from the sight of the employees. The employees gave the matter sufficient attention to satisfy themselves that the children had left the premises, and that they were no longer in danger. Up to this point it is not contended that the defendant's employees did not do all that due care required. Thereafter they directed their attention to their work, and continued switching and moving cars about the yard. In a few minutes the children, without the observation of the employees, again entered the yard and stood between the fence and the track several lots to the east of the place where they had left the premises, and there watched the car slowly approaching them. When it reached them, they, without the knowledge of the defendant's employees, took hold of it and attempted to get on it. To now hold with appellant's contention that the employees ought to have anticipated that the children might return, and that they were required to observe a lookout for them before moving and switching the car from one track to another, or to accompany it so as to warn the children away or prevent them from getting on it, requires not only a holding that the employees were in duty bound to use care to discover the presence of trespassing children, and of wholly unauthorized intrusions of others, to the same extent as to discover the presence of persons and children who may, with knowledge on the part of the employees, be rightfully about the premises, but also requires a holding that the employees were required to use care to prevent trespassing children from injuring themselves in the defendant's yard. Upon the undisputed facts in the case the law does not warrant such a holding. Though it should be held that the employees, in the switching and moving of cars about the yard, owed a duty in the premises to use

care in such operations, the evidence is insufficient to justify a finding that such operations were conducted in a negligent manner, or that the act of moving the car along the track was the proximate cause of the injury. So far as made to appear, the car was switched in the usual and ordinary way from one track, and moved along another, at a speed of from three to four miles an hour. The children were not struck by the car. It was not the manner in which the car was operated that caused it to collide with plaintiff, or that caused the plaintiff coming in contact with it. The direct cause of his coming in contact with the car was his taking hold of the car and attempting to ride on it without the knowledge or consent of the defendant's employees. While the child, because of its age, cannot be regarded a conscious trespasser, nor held chargeable of contributory negligence, nevertheless the consequences of its acts cannot be charged to the defendant. The conduct of the child was in no sense influenced or induced by any act or conduct on the part of the defendant or its employees, nor was the injury occasioned because of any negligence on their part. We are of the opinion that the court was justified in directing a verdict in favor of the defendant.

The judgment of the court below is therefore affirmed, with costs.

McCARTY, C. J., and FRICK, J., concur.

BOPP V. NEW YORK ELECTRIC VEHICLE TRANSPORTATION COMPANY.

Court of Appeals of New York. 1903.

177 New York, 33.

VANN, J.

At the close of the plaintiff's evidence in chief, each defendant made a separate motion for a nonsuit and each excepted to the action of the court in denying the motion. Each defendant had the right to then withdraw from the case and rest upon its exception. Neither did so. The Vehicle Company picked up the burden first, put in its evi-

dence and again moved for a nonsuit. Assuming that an exception was taken to the denial of its motion, for the second time it was in a situation to rely on its exception and refuse to take any further part in the trial. It did not do so. On the contrary, it continued to take an active and aggressive part in the trial by cross-examining the witnesses of its codefendant, thoroughly and at length. It aided in developing the facts and attempted to defend itself against the allegations of the plaintiff and the effort of the other defendant to fasten the responsibility upon it alone. It did not succeed, and it now claims that all its action, after its motions to nonsuit were denied, should go for naught and be ignored upon the ground that the question is the same as if it had withdrawn from the case at that time. We do not think so. It did not remain in the case for amusement, but for self-defense, and it could not make further efforts to defend itself without running the usual risks. The plaintiff had the right to rely upon any evidence in her favor, whether it was put in by herself or by either defendant, and the Vehicle Company by failing to withdraw when it had the right to and continuing to take part in the trial, ran the risk that evidence tending to make it liable would be received. The situation does not differ in principle from the ordinary case where a sole defendant, instead of withdrawing when he fails to secure a nonsuit, continues to take part in the investigation to the end. In so doing, even if his motion should have been granted when made, the exception is undermined and becomes of no avail, provided at the close of the whole case the evidence presents a question for the jury.

Thus in *Jones v. Union Railway Company* (18 App. Div. 267, 268) Judge Cullen said: "When the defendant enters into its proof, the question never is, whether the plaintiff's evidence is sufficient to justify the submission of the case to the jury, but whether, on the whole case, there is a question of fact as to the defendant's liability. If, at the close of a plaintiff's case, the defendant is confident that no cause of action has been made out, the only method of securing a review of an erroneous ruling on the point is to let the case stand without further evidence. If the defendant enters upon its evidence, it takes the chances of supplying the deficiencies of the plaintiff's case."

So in *Hopkins v. Clark* (158 N. Y. 299, 304) we said through Judge Bartlett: "The rule laid down by the Supreme Court of the United States seems the proper one, to the effect that when a defendant, after the close of the plaintiff's evidence, moves to dismiss, and, the motion being denied, excepts thereto, and then proceeds with his case, and puts in evidence on his part, he thereby waives the exception, and the overruling of the motion to dismiss cannot be assigned as error."

Judge Martin relied upon the case last cited, when, speaking for us all, he said: "Where after a motion to dismiss at the close of the plaintiff's evidence, a defendant proceeds with his case and puts in evidence on his part, he thereby waives the exception to the refusal to nonsuit when the plaintiff rested." (*Sigua Iron Co. v. Brown*, 171 N. Y. 488, 506).

The rule of the Federal courts was expressed by Chief Justice Waite as follows: "It is undoubtedly true that a case may be presented in which the refusal to direct a verdict for the defendant at the close of the plaintiff's testimony will be good ground for the reversal of a judgment on a verdict in favor of the plaintiff, if the defendant rests his case on such testimony and introduces none in his own behalf; but if he goes on with his defense and puts in testimony of his own, and the jury, under proper instructions, finds against him on the whole evidence, the judgment cannot be reversed, in the absence of the defendant's testimony, on account of the original refusal, even though it would not have been wrong to give the instruction at the time it was asked." (*Grand Trunk Railway Co. v. Cummings*, 106 U. S. 700, 701. See, also, *Littlejohn v. Shaw*, 159 N. Y. 188, 191; *Wangner v. Grimm*, 169 N. Y. 421, 427; *Accident Insurance Co. v. Crandal*, 120 U. S. 527; *Northern Pacific R. R. Co. v. Mares*, 123 U. S. 710; *Robertson v. Perkins*, 129 U. S. 233; *Columbia & P. S. R. R. Co. v. Hawthorne*, 144 U. S. 202, 206; *Union Pacific R. Co. v. Daniels*, 152 U. S. 684.)

In the cases cited the defendant ran the risk that his own evidence might supply any defect in the plaintiff's evidence. So, in this case, the Vehicle Company, by continuing to try its case, for that is what it did, ran the risk that the evidence of its codefendant would supply the de-

fects in the plaintiff's case against itself. It could not keep on trying its case without abiding by the condition of the evidence when all the testimony was in. At that time there was a question for the jury as to its liability, and hence its previous exceptions, taken when the evidence did not present that question, became of no avail.

It did not let go of the case when it could have done so in safety, but hung on until there was evidence enough to warrant a verdict against it.

Courts sit to do justice according to the rules of law after giving all parties an opportunity to be heard. The Vehicle Company had its day in court and was fully heard. No legal evidence was excluded and no incompetent evidence was received to its injury. It took no exception to the charge of the court. Under these circumstances public business and private rights should not be delayed by granting a new trial on account of an error which was waived by the subsequent course of the party now complaining.

The Vehicle Company was not compelled to remain in the case in order to get an exception when its second motion was not granted, because an effort to except, made at the proper time and in the proper form, is an exception, whether allowed by the court or not.

After considering all the exceptions taken by both defendants we find none upon which a new trial should be granted in behalf of either.

The judgment should be affirmed, with costs.

GRAY, J. (dissenting).

* * * * *

HAIGHT, MARTIN and WERNER, JJ., concur with VANN, J.; PARKER, Ch. J., and O'BRIEN, J., concur with GRAY, J.

Judgment affirmed.

SECTION 3. DIRECTED VERDICT.

(a) *When Proper.*

MEYER V. HOUCK.

*Supreme Court of Iowa. 1892.**85 Iowa, 319.*

The defendants are husband and wife. On the twenty-seventh day of November, 1889, the defendant C. F. Houck executed and delivered to Calla Houck his promissory note for about twelve hundred dollars, and a chattel mortgage upon a stock of goods and merchandise, to secure the payment of the note. The mortgage was filed for record on the fourth day of December, 1889, and duly recorded. On the seventh day of December, 1889, the plaintiffs commenced an action against C. F. Houck upon an account for goods sold and delivered to him, and sued out an attachment, and caused the same to be levied upon the mortgaged goods. Calla Houck intervened in the action, and claimed the goods as mortgagee. The plaintiffs answered her petition of intervention by claiming that the mortgage was invalid and void as to creditors of C. F. Houck, because it was made with intent to defraud said creditors. There was a trial by jury, and when the plaintiffs completed the introduction of their evidence the intervenor moved the court to direct the jury to return a verdict against the plaintiffs. The motion was sustained, and the jury returned the verdict as directed, upon which judgment was entered. The plaintiffs appeal.—Affirmed.

ROTHROCK, J.

* * * * *

But it is further claimed that there was some evidence tending to show that the transaction in question was fraudulent, and that it was the duty of the court to submit the case to the jury if there was any evidence, however slight. It may be conceded that there was some evidence. There are one or two facts which might be regarded as badges of fraud; but, when weighed in the balance with the other evidence, they do not constitute such a conflict as would authorize a verdict for the plaintiffs. The rule of practice

in relation to directing verdicts which has prevailed in this state is well understood. A motion to direct a verdict for the defendant has been regarded as a demurrer to the evidence, and it has always been held that such a motion not only admits the truth of the fact found, but every fact and conclusion which the evidence conduces to prove, or which the jury might have inferred therefrom in his favor. The rule was stated in very nearly the foregoing language in *Jones v. Ireland*, 4 Iowa, 63. And that practice has obtained in this state up to the present time. There are a multitude of cases adhering to the rule. It is unnecessary to cite them. They will be found collected in McClain's Digest (volume 2, pp. 335-338). The practice has been that where there is what is called a "*scintilla* of evidence" to be considered by the jury, it is error to direct a verdict. The rule has been stated in various forms of expression, as will be seen by an examination of the cases. In *Way v. Illinois Central R'y Co.*, 35 Iowa, 585, the following language is employed: "Hence, under the statute, and our previous rulings, it follows that it is the duty of a *nisi prius* court in this state to submit the case to the jury upon the evidence where it only tends even to prove it, although the court should feel in duty bound to set aside a verdict for the plaintiff if the jury should so find." It is further said in that case that "in other states a different, and perhaps better and more consistent rule obtains whereby the court may direct the jury how to find, where it would set aside a verdict otherwise." Citing *Brown v. R'y Co.*, 58 Me. 389; *Wilds v. Hudson River R'y Co.*, 24 N. Y. 430. In other cases the statement of the rule has been modified, as in *Starry v. Dubuque & S. W. R'y Co.*, 51 Iowa, 419, in which the district court directed a verdict for the defendant, this court said: "Such being the case, it would have been the duty of the court to set aside a verdict in favor of the plaintiff. Why, then, occupy the valuable time of the court at the public expense for the purpose of going through a useless form and ceremony?" Language to the same effect will be found in the case of *Bothwell v. C. M. & St. P. R'y Co.*, 59 Iowa, 192. After a thorough examination of adjudged cases, we have reached the conclusion that the practice should be changed so as to harmonize with that "better and more consistent rule" referred to in *Way v. R'y Co.*,

supra, which now obtains in England and in the United States courts, and in nearly all the states of the Union.

The doctrine in England on this question is well stated in the following language: "But there is in every case a preliminary question, which is one of law, namely, whether there is any evidence on which the jury could properly find the verdict for the party on whom the *onus* of proof lies. If there is not, the judge ought to withdraw the question from the jury, and direct a nonsuit if the *onus* is on the plaintiff, or direct a verdict for the plaintiff if the *onus* is on the defendant. It was formerly considered necessary in all cases to leave the question to the jury if there was any evidence, even a *scintilla*, in support of the case, but it is now settled that the question for the judge (subject, of course, to review) is, as is stated by Maule, J., in *Jewell v. Parr*, 13 C. B. 916, 'not whether there is literally no evidence, but whether there is none that ought reasonably to satisfy the jury that the fact sought to be proved is established.' " *Ryder v. Wombwell*, L. R. 4 Exch. 32; *The Directors, etc., of the Metropolitan R'y Co. v. Jackson*, L. R. 3 App. Cas. 193; *The Directors, etc., of the Dublin, W. & W. R'y Co. v. Slatterly* Id. 1155.

The rule, as stated by the supreme court of the United States, is as follows: "The judges are no longer required to submit a case to a jury merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such a *character that it would warrant* the jury to proceed in finding a verdict in favor of the party introducing such evidence. Decided cases may be found where it is held that, if there is a *scintilla* of evidence in support of a case, the judge is bound to leave it to the jury; but the modern decisions have established a more reasonable rule, to-wit: that before the evidence is left to the jury there is or may be in every case a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it upon whom the burden of proof is imposed." *Commissioners v. Clark*, 94 U. S. 278. See also, *Improvement Co. v. Munson*, 14 Wall. 448; *Pleasants v. Fant*, 22 Wall. 120; *Parks v. Ross*, 11 How. 373; *Merchants Bank v. State Bank*, 10 Wall. 637; *Hickman v. Jones*, 9 Wall. 201.

In *Pleasants v. Fant*, *supra*, the following language is used: "It is the duty of the court, in its relation to the jury, to protect parties from unjust verdicts arising from ignorance of the rules of law and of evidence, from impulse of passion or prejudice, or from any other violation of his lawful rights in the conduct of a trial. This is done by making plain to them the issues they are to try; by admitting only such evidence as is proper in these issues, and rejecting all else; by instructing them in the rules of law by which that evidence is to be examined and applied; and finally, when necessary, by setting aside a verdict which is unsupported by evidence, or contrary to law. In the discharge of this duty it is the province of the court, either before or after verdict, to decide whether the plaintiff has given evidence sufficient to support or justify a verdict in his favor; not whether on all the evidence the preponderating weight is in his favor; that is the business of the jury. But conceding to all the evidence offered the greatest probative force which, according to the law of evidence, it is fairly entitled to, is it sufficient to justify a verdict? If it does not, then it is the duty of the court, after a verdict, to set it aside, and grant a new trial. Must the court go through the idle ceremony, in such a case, of submitting to the jury the testimony on which the plaintiff relies when it is clear to the judicial mind that, if the jury should find a verdict in favor of plaintiff, that verdict would be set aside, and a new trial had? Such a proposition is absurd, and accordingly we hold the true principle to be that, if the court is satisfied that, conceding all the inferences which the jury could justifiably draw from the testimony, the evidence is insufficient to warrant a verdict for the plaintiff, the court should say so to the jury." The same doctrine may be found in the following cases: *Raby v. Cell*, 85 Pa. St. 80, in which it is said that "at one time, indeed, it was the admitted doctrine that, if there was any, the least evidence,—a mere *scintilla*,—the question must be submitted to the jury. But that doctrine has been very justly exploded both in England and in this state." *Wittkowsky v. Wasson*, 71 N. C. 451; *Zettler v. City of Atlanta*, 66 Ga. 195; *Weis v. City of Madison*, 75 Ind. 241; *Dryden v. Britton*, 19 Wis. 31; *Baldwin v. Shannon*, 43 N. J. Law, 596. *Brown v. R'y Co.*, 58 Me. 384, in which it is said: "It would

be absurd to send a cause to a jury when the verdict, if rendered in favor of the plaintiff, would not be permitted to stand. *Wilds v. Hudson River R'y Co.*, 24 N. Y. 430, in which it is said: "No legal principle compels him (the judge) to allow a jury to render a merely idle verdict." *Brown v. Massachusetts M. & L. Insurance Co.*, 59 N. H. 298; *Brooks v. Somerville*, 106 Mass. 271; *Ensminger v. McIntire*, 23 Cal. 593; *Morgan v. Durfee*, 69 Mo. 469; *Simmons v. Chicago & T. R'y Co.*, 110 Ill. 340. We might cite other adjudged cases to the same effect, but it is unnecessary. It will be seen from what we have cited that the whole turn of legal thought in this country and in England is contrary to the rule of practice which requires a court to go on for several days with the trial of a case to a jury when the verdict must in the end be either for the defendant, or be set aside if for the plaintiff. It is true there are decisions to be found in a few states in which a *scintilla* of evidence is allowed to go to the jury. But an examination of the later cases in some of these states will show that the rule has not been adhered to. We have cited enough cases to show that the great weight of modern authority is contrary to the rule which this court has adhered to, though it has more than once intimated that the other rule adopted by the large majority of courts of last resort is better and more consistent.

Our conclusion is that when a motion is made to direct a verdict, the trial judge should sustain the motion when, considering all of the evidence, it clearly appears to him that it would be his duty to set aside a verdict if found in favor of the party upon whom the burden of proof rests. The adoption of this rule is no abridgment of the right of trial by jury. A party against whom a verdict has been directed by the court can have the ruling of the court reviewed by exception and appeal just as well as he can if the rule were otherwise, and he takes an appeal to this court from an order granting a new trial after verdict. He has no right to insist that the trial of his cause be continued as a mere idle form, or a mere experiment, that he may have the gratification of securing a verdict which must be set aside. As we have seen, courts very generally now designate such a proceeding as absurd. Probably this court has too long followed the rule to be in a position to de-

nounce it in that way; but we think that, as the question involves no more than the change of a mere rule of practice, which will be of material advantage in the trial of cases in the saving of the time of the trial courts,—time which ought to be devoted to the transaction of legitimate business,—and the saving of court expenses to the counties, with no detriment to the rights of any one, it is high time that this state should adopt the more consistent and logical practice which now generally prevails elsewhere.

The judgment of the district court is affirmed.

MCDONALD V. METROPOLITAN STREET RAILWAY COMPANY.

Court of Appeals of New York. 1901.

167 New York, 66.

MARTIN, J.

This action was for personal injuries resulting in death of the plaintiff's intestate, and was based upon the alleged negligence of the defendant. An appeal was allowed to this court upon the ground of an existing conflict in the decisions of different departments of the Appellate Division as to when a verdict may be directed where there is an issue of fact, and because in this case an erroneous principle was asserted which, if allowed to pass uncorrected, would be likely "to introduce confusion into the body of the law." (*Sciolina v. Erie Preserving Co.*, 151 N. Y. 50.) The court having directed a verdict, the appellant is entitled to the most favorable inferences deducible from the evidence, and all disputed facts are to be treated as established in her favor. (*Ladd v. Aetna Ins. Co.*, 147 N. Y. 478, 482; *Higgins v. Eagleton*, 155 N. Y. 466; *Ten Eyck v. Whitbeck*, 156 N. Y. 341, 349; *Bank of Monongahela Valley v. Weston*, 159 N. Y. 201, 208.)

If believed, the testimony of the plaintiff's witnesses was sufficient to justify the jury in finding the defendant negligent and the plaintiff's intestate free from contributory negligence. The evidence of the defendant was in many

respects in direct conflict, and if credited would have sustained a verdict in its favor. Whether the defendant was negligent, the plaintiff's intestate free from contributory negligence, and the amount of damages, were submitted to the jury. It, however, having agreed upon a general verdict and failed to answer the questions submitted, the trial judge withdrew them and directed a verdict for the defendant. Upon the verdict so directed a judgment was entered. Subsequently an appeal was taken to the Appellate Division, where it was affirmed, and the plaintiff has now appealed to this court.

Although there was a direct and somewhat severe conflict in the evidence, the questions of negligence and contributory negligence were clearly of fact, and were for the jury and not for the court unless the right of trial by jury is to be partially if not wholly abolished. It was assumed below that the plaintiff's evidence established a case which, undisputed, was sufficient to warrant a verdict in her favor. But the court said that at the close of the defendant's evidence the plaintiff's case had been so far overcome that a verdict in her favor would have been set aside as against the weight of evidence. Upon that alleged condition of the proof, it held that the trial court might have properly submitted the case to the jury if it saw fit, but that it was not required to as the verdict might have been thus set aside. The practical result of that decision, if sustained, is in every close case to vest in the trial court authority to determine questions of fact, although the parties have a right to a jury trial, if it thinks that the weight of evidence is in favor of one and it directs a verdict in his favor.

There have been statements by courts which seem to lend some justification to that theory, but we think no such broad principle has been intended and that no such rule can be maintained either upon principle or authority. The rule that a verdict may be directed whenever the proof is such that a decision to the contrary might be set aside as against the weight of evidence would be both uncertain and delusive. There is no standard by which to determine when a verdict may be thus set aside. It depends upon the discretion of the court. The result of setting aside a verdict and the result of directing one are

widely different and should not be controlled by the same conditions or circumstances. In one case there is a retrial. In the other the judgment is final. One rests in discretion; the other upon legal right. One involves a mere matter of remedy or procedure. The other determines substantive and substantial rights. Such a rule would have no just principle upon which to rest.

While in many cases, even where the evidence is sufficient to sustain it, a verdict may be properly set aside and a new trial ordered, yet, that in every such case the trial court may, whenever it sees fit, direct a verdict and thus forever conclude the parties, has no basis in the law, which confides to juries and not to courts the determination of the facts in this class of cases.

We think it cannot be correctly said in any case where the right of trial by jury exists and the evidence presents an actual issue of fact, that the court may properly direct a verdict. So long as a question of fact exists, it is for the jury and not for the court. If the evidence is insufficient, or if that which has been introduced is conclusively answered, so that, as a matter of law, no question of credibility or issue of fact remains, then the question being one of law, it is the duty of the court to determine it. But whenever a plaintiff has established facts or circumstances which would justify a finding in his favor, the right to have the issue of fact determined by a jury continues, and the case must ultimately be submitted to it.

The credibility of witnesses, the effect and weight of conflicting and contradictory testimony, are all questions of fact and not questions of law. If a court of review having power to examine the facts is dissatisfied with a verdict because against the weight or preponderance of evidence, it may be set aside, but a new trial must be granted before another jury so that the issue of fact may be ultimately determined by the tribunal to which those questions are confided. If there is no evidence to sustain an opposite verdict, a trial court is justified in directing one, not because it would have authority to set aside an opposite one, but because there was an actual defect of proof, and, hence, as a matter of law, the party was not entitled to recover. (*Colt v. Sixth Ave. R. R. Co.*, 49 N. Y. 671; *Bagley v. Bowe*, 105 N. Y. 171, 179.)

* * * * *

We are of the opinion that a plain issue of fact was presented for the jury; that the court erred in directing a verdict; that the judgment and order should be reversed and a new trial granted, with costs to abide the event.

PARKER, Ch. J., BARTLETT, VANN, CULLEN and WERNER, JJ., concur; GRAY, J., dissents.

Judgment reversed, etc.

GILES V. GILES.

Supreme Judicial Court of Massachusetts. 1910.

204 Massachusetts, 383.

KNOWLTON, C. J.—This was a trial in the Superior Court upon three issues, framed upon an appeal from a decree of the Probate Court allowing the will of Charles E. Giles. The first issue presented the question whether the will was duly executed. The second raised the question whether it was procured by the undue influence of the petitioner. The third issue was as follows: “Was said instrument revoked by the said Charles E. Giles subsequently to the date, execution and publication thereof by the making, execution and publication of another will which has been lost or destroyed, and its contents cannot be proved so that it can be propounded for probate?”

Upon the first issue, after testimony by the subscribing witnesses tending to show that the will was properly executed, it was admitted in evidence, subject to the appellant’s exception, and at the close of the testimony the jury were directed to return a verdict in favor of the petitioner. To this direction the appellants excepted.

The will was rightly admitted in evidence, and the testimony well warranted a finding that it was duly executed. If, indeed, full credence was given to the testimony of these witnesses, this conclusion followed almost necessarily. It is true that two of the witnesses had little definite recollection of the transaction, apart from their knowledge that their signatures to the clause of attestation were genuine,

and that they knew from their signing that they saw the execution of the will by the testator in the presence of the three witnesses. While the jury, upon the facts, could not have been expected to reach any other conclusion than that which was recorded under the direction of the court, the issue was one to be passed upon by a jury, which is the ordinary tribunal for the determination of questions of fact. Where a proposition is only to be established by testimony of witnesses, the judge cannot properly direct a jury to decide that the fact is proved affirmatively by testimony. It is for the jury to say whether the witnesses are entitled to credit. *Merchants' National Bank v. Haverhill Iron Works*, 159 Mass. 158; *Commonwealth v. McNeese*, 156 Mass. 231; *Way v. Butterworth*, 106 Mass. 75; *Whitten v. Haverhill*, *ante*, 95. We know of no case in this Commonwealth in which it has been determined that a jury can be directed to return a verdict, upon the oral testimony of witnesses, in favor of a party who has the burden of proving the facts to which they have testified. This direction was erroneous and the exception must be sustained.

* * * * *

Verdict on the first issue set aside; verdict on the third issue to stand.¹

¹*Accord*: *Haughton v. Aetna Life Ins. Co.*, (1905) 165 Ind. 32, 73 N. E. 592; *Wolff v. Campbell*, (1892) 110 Mo. 114, 19 S. W. 622; *Anniston National Bank v. School Committee*, (1897) 121 N. C. 107, 28 S. E. 134; *Perkiomen R. R. Co. v. Kremer*, (1907) 218 Pa. St. 641, 67 Atl. 913.

On the other hand, there are many cases to be found where a directed verdict for the party having the burden of proof, based on parol evidence, has been approved. See *Inhabitants of Woodstock v. Inhabitants of Canton*, (1897) 91 Me. 62, 39 Atl. 281; *Harding v. Roman Catholic Church*, (1906) 113 N. Y. App. Div. 685; *Israel v. Day*, (1907) 41 Colo. 52, 92 Pac. 698; *Shumate v. Ryan*, (1906) 127 Ga. 118, 56 S. E. 103; *Hillis v. First National Bank*, (1894) 54 Kan. 421, 38 Pac. 565; *Murray v. Bush*, (1902) 29 Wash. 662, 70 Pac. 133. This would seem to be the only logical rule in those jurisdictions where the doctrine of *Meyer v. Houck*, (*supra*) is in force.

(b) *Effect of Requests by Both Parties.*

EMPIRE STATE CATTLE COMPANY V. ATCHISON,
TOPEKA & SANTA FE RAILWAY COMPANY.

MINNESOTA AND DAKOTA CATTLE COMPANY V.
SAME.

Supreme Court of the United States. 1907.

210 United States, 1.

MR. JUSTICE WHITE delivered the opinion of the court.

With the object of saving them from destruction by the flood which engulfed portions of Kansas City on May 31 and the first week of June, 1903, more than three thousand head of cattle belonging to the petitioners, which were in the Kansas City stock yards, were driven and crowded upon certain overhead viaducts in those yards. For about seven days, until the subsidence of the flood, they were there detained and could not be properly fed and watered. Many of them died and the remainder were greatly lessened in value. These actions were brought by the petitioners to recover for the loss so sustained upon the ground that the cattle were in the control of the defendant railway company as a common carrier, and that the loss sustained was occasioned by its negligence.

The railway company defended in each case upon the ground that before the loss happened it had delivered the cattle to a connecting carrier, but that if the cattle were in its custody it was without fault, and the damage was solely the result of an act of God, that is, the flood above referred to.

As the cases depended upon substantially similar facts and involved identical questions of law, they were tried together, and at the close of the evidence the trial court denied a peremptory instruction asked on behalf of the plaintiffs, and gave one asked on behalf of the railway company. 135 Fed. Rep. 135.

While there was some contention in the argument as to what took place concerning the requests for peremptory instructions, we think the bill of exceptions establishes that at the close of the evidence the plaintiffs requested a per-

emptory instruction in their favor, and on its being refused duly excepted and asked a number of special instructions, which were each in turn refused, and exceptions were separately reserved, and the court then granted a request for a peremptory instruction in favor of the railway company, to which the plaintiffs excepted.

On the writs of error which were prosecuted from the Circuit Court of Appeals for the Eighth Circuit that court affirmed the judgment on the ground that as both parties had asked a peremptory instruction the facts were thereby submitted to the trial judge, and hence the only inquiry open was whether any evidence had been introduced which tended to support the inferences of fact drawn by the trial judge from the evidence. One of the members of the Circuit Court of Appeals (Circuit Judge Sanborn) did not concur in the opinion of the court, because he deemed that as the request for peremptory instruction made on behalf of plaintiffs was followed by special requests seeking to have the jury determine the facts, the asking for a peremptory instruction did not amount to a submission of the facts to the court so as to exclude the right to have the case go to the jury in accordance with the subsequent special requests. He, nevertheless, concurred in the judgment of affirmance, because, after examining the entire case, he was of opinion that prejudicial error had not been committed, as the evidence was insufficient to have justified the submission of the issues to the jury. 147 Fed. Rep. 457.

The cases are here because of the allowance of writs of certiorari. They present similar questions of fact and law, were argued together and are, therefore, embraced in one opinion. The scope of the inquiry before us needs, at the outset, to be accurately fixed. To do so requires us to consider the question which gave rise to a division of opinion in the Circuit Court of Appeals. If it be that the request by both parties for a peremptory instruction is to be treated as a submission of the cause to the court, despite the fact that the plaintiffs asked special instructions upon the effect of the evidence then, as said in *Beuttell v. Magone*, 157 U. S. 154, "the facts having been thus submitted to the court, we are limited in reviewing its action, to a consideration of the correctness of the finding on the law and must affirm if there be any evidence in support thereof." If, on

the other hand, it be that, although the plaintiffs had requested a peremptory instruction, the right to go to the jury was not waived in view of the other requested instructions, then our inquiry has a wider scope, that is, extends to determining whether the special instructions asked were rightly refused, either because of their inherent unsoundness or because, in any event, the evidence was not such as would have justified the court in submitting the case to the jury. It was settled in *Beuttell v. Magone*, *supra*, that where both parties request a peremptory instruction and do nothing more, they thereby assume the facts to be undisputed and in effect submit to the trial judge the determination of the inferences proper to be drawn from them. But nothing in that ruling sustains the view that a party may not request a peremptory instruction, and yet, upon the refusal of the court to give it, insist, by appropriate requests, upon the submission of the case to the jury, where the evidence is conflicting or the inferences to be drawn from the testimony are divergent. To hold the contrary would unduly extend the doctrine of *Beuttell v. Magone*, by causing it to embrace a case not within the ruling in that case made. The distinction between a case like the one before us and that which was under consideration in *Beuttell v. Magone* has been pointed out in several recent decisions of Circuit Courts of Appeals. It was accurately noted in an opinion delivered by Circuit Judge Severns, speaking for the Circuit Court of Appeals for the Sixth Circuit in *Minahan v. Grand Trunk Ry. Co.*, 138 Fed. Rep. 37, 41, and was also lucidly stated in the concurring opinion of Shelby, Circuit Judge, in *McCormack v. National City Bank of Waco*, 142 Fed. Rep. 132, where, referring to *Beuttell v. Magone*, he said (p. 133):

“A party may believe that a certain fact which is proved without conflict or dispute entitles him to a verdict. But there may be evidence of other, but controverted facts, which, if proved to the satisfaction of the jury, entitles him to a verdict, regardless of the evidence on which he relies in the first place. It cannot be that the practice would not permit him to ask for peremptory instructions, and, if the court refuses, to then ask for instruction submitting the other question to the jury. And if he has the right to do this, no request for instructions that his opponent may ask

can deprive him of the right. There is nothing in *Beuttell v. Magone*, *supra*, that conflicts with this view when the announcement of the court is applied to the facts of the case as stated in the opinion.

"In New York there are many cases showing conformity to the practice announced in *Beuttell v. Magone*, but they clearly recognize the right of a party who has asked for peremptory instructions to go to the jury on controverted questions of fact if he asks the court to submit such questions to the jury. *Kirtz v. Peck*, 113 N. Y. 226; S. C., 21 N. E. 130; *Sutter v. Vanderveer*, 122 N. Y. 652; S. C., 25 N. E. 907.

"The fact that each party asks for a peremptory instruction to find in his favor does not submit the issues of fact to the court so as to deprive the party of the right to ask other instructions, and to except to the refusal to give them, nor does it deprive him of the right to have questions of fact submitted to the jury if issues are joined on which conflicting evidence has been offered. *Minahan v. G. T. W. Ry. Co.*, (C. C. A.), 138 Fed. Rep. 37."

From this it follows that the action of the trial court in giving the peremptory instruction to return a verdict for the railway company cannot be sustained merely because of the request made by both parties for a peremptory instruction in view of the special requests asked on behalf of the plaintiffs. The correctness, therefore, of the action of the court in giving the peremptory instruction depends, not upon the mere requests which were made on that subject, but upon whether the state of the proof was such as to have authorized the court, in the exercise of a sound discretion, to decline to submit the cause to the jury. That is to say, the validity of the peremptory instruction must depend upon whether the evidence was so undisputed or was of such a conclusive character as would have made it the duty of the court to set aside the verdicts if the cases had been given to the jury and verdicts returned in favor of the plaintiff. *McGuire v. Blount*, 199 U. S. 142, 148, and cases cited; *Marande v. Texas & P. R. Co.*, 184 U. S. 191, and cases cited; *Southern Pacific Co. v. Pool*, 160 U. S. 440, and cases cited.

To dispose of this question requires us to consider somewhat in detail the origin of the controversy, the contracts of shipment from which the controversy arose and the proof

which is embodied in the bill of exceptions relied on to justify the inference of liability on the part of the railway company.

* * * * *

* * * As we think the undisputed proof to which we have referred not only established the existence of the necessity for the change of route, but also, beyond dispute, demonstrated that there was an entire absence of all negligence in selecting that route, we are clearly of opinion that no liability was entailed simply by reason of the change, even if that change could in law be treated as a concurring and proximate cause of the damages which subsequently resulted.

Affirmed.

WOLF V. CHICAGO SIGN PRINTING COMPANY.

Supreme Court of Illinois. 1908.

233 Illinois, 501.

MR. JUSTICE CARTWRIGHT delivered the opinion of the court:

Fred W. Wolf, appellee, brought this suit in assumpsit in the circuit court of Cook county against the Chicago Sign Printing Company, appellant, and his declaration consisted of the common counts, to which a plea of the general issue was filed. There was a jury trial, and at the close of all the evidence the defendant moved the court to direct a verdict in its favor. The court denied the motion and the defendant excepted. The plaintiff then moved the court to direct a verdict in his favor, and the court granted the motion and instructed the jury to find the issues for the plaintiff and assess his damages at \$4,000, with interest thereon at five per cent from August 19, 1902. The defendant excepted to the granting of the motion and giving the instruction. A verdict was returned, in accordance with the direction of the court, for \$4,716.66, and the court, after overruling motions for a new trial and in arrest of judgment, entered judgment on the verdict. The Branch Ap-

pellate Court for the First District affirmed the judgment.

The defendant is a corporation with a capital stock of \$5,000. In 1902 Ernest Salmstein was president and Albert H. Ernecke was secretary and treasurer of the corporation. The stockholders had considered the question of increasing the capital stock from \$5,000 to \$25,000, and Salmstein and Ernecke had tried to induce the plaintiff to subscribe for part of the increase, but no proceedings had been taken for such increase. On August 18, 1902, Ernecke obtained from plaintiff a check, payable to the defendant, for \$4,000, and the proceeds were received by the defendant the next day. The suit was for the money represented by the check, with interest, and the disputed question of fact was whether the money was loaned by plaintiff to defendant or was a partial payment upon an agreement to subscribe for \$9,500 of capital stock when an increase should be effected. At the time the check was delivered the following receipt was left with the plaintiff:

“Chicago, 8-18, 1902.

“Received of Mr. Fred W. Wolf the sum of four thousand dollars (\$4,000) account Chicago Sign Printing Co.

A. H. Ernecke,

Secy. and Treas. Chicago Sign Printing Co.

“\$4,000.00.

8-18, 1902.

“The above amount is part payment on stock in above concern to be issued shortly.

A. H. Ernecke.”

The evidence for the defendant was that this entire paper expressed the agreement between the parties and that it was all written when the check was given. The evidence for the plaintiff was that he had refused to take any stock, but agreed to and did loan the money to the corporation; that the receipt was written, and that the recital that the money was part payment on stock was added without his knowledge by Ernecke and the paper was left lying on the plaintiff's table. * * *

The assignment of error to which the argument is devoted is that the court erred in instructing the jury to return a verdict for the plaintiff, and especially in directing an assessment of interest from the date of the check. In answer to the argument on that question it is contended that each party having moved the court to direct a verdict

in favor of such party, they waived the right to submit any question to the jury and elected to submit the case to the court for its decision, both upon the law and the facts. Section 60 of the Practice act provides for the waiver of a jury trial and a trial by the court of both matters of law and fact in case both parties shall so agree, and in the event of such agreement section 61 provides for submitting written propositions to be held as the law in the decision of the case, and section 82 provides for taking exceptions to decisions of the court either relating to receiving improper or rejecting proper testimony or to the final judgment upon the law and evidence. There was no such waiver of a jury trial in this case, and if the right to a verdict of the jury upon the facts was waived it was only by implication, and this court has not recognized any waiver of the kind insisted upon here.

When the practice of demurring to the evidence fell into disuse and that of making a motion that the court direct a verdict was substituted, some difference arose in the decisions of the different courts as to the nature and effect of such a motion, but the ground of the motion and the practice have been thoroughly settled in this State. The motion to direct a verdict raises only a question of law as to the legal sufficiency of the evidence to sustain a verdict against the party making the motion. (*Angus v. Chicago Trust and Savings Bank*, 170 Ill. 298; *Rack v. Chicago City Railway Co.*, 173 id. 289; *Marshall v. Grosse Clothing Co.*, 184 id. 421; *Martin v. Chicago and Northwestern Railway Co.*, 194 id. 138.) In the event of an adverse ruling on the motion to direct a verdict, an exception preserves the question of law for the consideration of an appellate tribunal. The submission of a question of fact to the jury does not waive the question of law already passed upon by the court where the rights of the party have been properly preserved. (*Chicago Union Traction Co. v. O'Donnell*, 211 Ill. 349; *Illinois Central Railroad Co. v. Swift*, 213 id. 307; *Chicago Terminal Transfer Railroad Co. v. Schiavone*, 216 id. 275.) Some courts have held that where both parties ask the trial court to direct the verdict it amounts to a request that the court shall find the facts and a waiver of any right to the judgment of the jury upon controverted questions of fact. The Supreme Court of the United States held to that doc-

trine in *Beuttell v. Magone*, 157 U. S. 154, and said that by making the motion both parties affirmed that there was no disputed question of fact which could operate to deflect or control the question of law, and that this was necessarily a request that the court find the facts. That decision has, of course, been followed by the Circuit Court of Appeals, and there is a formidable list of cases in which it has been applied by those courts. In New York, if any party asks the court to direct a verdict and his motion is denied, he must then ask the court for leave to go to the jury upon questions of fact, and it is held that there is no question for the jury unless such a request is made. Accordingly, it is there held that if both parties ask the court to direct a verdict, and the court grants the motion of one party and the other makes no request to be allowed to go to the jury on questions of fact but acquiesces in the determination of such questions by the court, he has waived all objection to the mode of trial. In *Thompson v. Simpson*, 128 N. Y. 270, it is said that the effect of a request by each party for a direction of a verdict in his favor clothes the court with the functions of a jury, and the courts declare that the request by both parties for the direction of a verdict amounts to the submission of the whole case to the trial judge, and his decision upon the facts has the same effect as if the jury had found a verdict after the case was submitted to them. (*Adams v. Roscoe Lumber Co.*, 159 N. Y. 176; *Smith v. Weston*, id. 194; *Clason v. Baldwin*, 46 N. E. Rep. 322; *Sigua Iron Co. v. Brown*, 64 id. 194.) It will readily be seen that such a rule would not be in harmony with our decisions, and to say that a request to the court to decide a pure question of law clothes the court with power to decide controverted questions of fact would be both illogical and inconsistent with the nature of the motion. Under our practice a request to withdraw a case from the jury could scarcely be converted into an application to the court to take the place of the jury and decide disputed questions of fact. After the court refuses to withdraw the case from the jury it is not requisite, in our practice, for the party to ask the court to allow the jury to decide it, which the court has already done by denying the motion. When one party asks the court to direct a verdict in his favor, the fact that the other party makes a similar motion cannot in any way affect the rights of the first party.

If that were true, no party could make a motion for a directed verdict without waiving his right to trial by jury if his opponent chose to make the same motion. The decisions relied upon to establish the doctrine that if both parties ask the court to decide a question of law they each waive the right to trial by jury of controverted questions of fact are inapplicable to the practice in this State, and the fact that each party in this case asked the court to direct a verdict did not amount to a submission of controverted questions of fact to the court.

* * * * *

* * * If the jury should believe the plaintiff and conclude that the transaction was a loan of the money, then, under the statute, the plaintiff would be entitled to recover five per cent from the time the money was loaned; but if the jury credited the evidence for the defendant and concluded that the transaction was an agreement to take stock, there could be no recovery of interest until the arrangement was repudiated by the plaintiff and a demand made for the return of the money. The plaintiff would only be entitled to interest from the time that he refused to carry out the agreement and take the stock. The court was not authorized to decide that disputed question of fact and to direct a verdict including interest from the date of the check. The defendant was entitled to the verdict of the jury on that question.

The judgments of the Appellate Court and Circuit Court are reversed and the cause is remanded to the Circuit Court.

Reversed and remanded.

(c) *When Motion to be Made.*

RAINGER V. BOSTON MUTUAL LIFE ASSOCIATION.

Supreme Judicial Court of Massachusetts. 1897.

167 Massachusetts, 109.

Contract, upon a policy of insurance for \$1,000, issued by the defendant on the life of Fred S. Rainger, and payable to the plaintiff, who was his wife. The answer set up,

among other defences, false and fraudulent representations by Rainger in his application for insurance. Trial in the Superior Court, before Dewey, J., who directed the jury to return a verdict for the defendant; and the plaintiff alleged exceptions. The facts material to the points decided appear in the opinion.

* * * * *

MORTON, J.

* * * * *

The plaintiff further contends that it was not within the power of the judge to order the jury to return a verdict for the defendant at the time when and under the circumstances which he did. All that the exceptions state on this point is: "At the close of the evidence arguments were made by counsel, and the presiding justice charged the jury. After the jury had deliberated upon the case for nearly six hours, they were called back into court. The foreman stated that they were unable to agree, and the presiding justice directed the jury to return a verdict for the defendant, to which the plaintiff duly excepted." So far as appears from the exceptions this took place in open court, and, if so, it is clear that the presiding justice had a right to call back the jury and direct them to return a verdict as he did. He did not lose his control over the jury because they had retired to a side room, under his direction, to deliberate on their verdict, and in the further conduct of the trial he could recall them and give them such additional directions or instructions as the case seemed to him to require. *Kullberg v. O'Donnell*, 158 Mass. 405; *Merritt v. New York, New Haven & Hartford Railroad*, 164 Mass. 440.

Exceptions overruled.

(d) *Power of Court to Compel Verdict.*CAHILL V. CHICAGO, MILWAUKEE, & ST. PAUL
RAILWAY COMPANY.*United States Circuit Court of Appeals, Seventh
Circuit. 1896.**20 Circuit Court of Appeals, 184.*

Before WOODS and JENKINS, Circuit Judges, and GROSS-
CUP, District Judge.

WOODS, Circuit Judge. This is an action on the case for personal injury suffered by Maria Cahill, the plaintiff in error, who, when attempting, afoot, to cross a switching track of the defendant in error at the Union Stock Yards, in Chicago, was struck and run over by a backing engine, whereby she lost both feet, and suffered other serious bodily injuries. * * *

* * * The Court below directed a verdict for the defendant. * * *

* * * * *

While we have treated the judgment in this case as if it had been rendered upon a verdict of the jury delivered in accordance with the court's peremptory direction, the fact is not literally so. The record shows that the jurors, at the conclusion of the charge, refused to render a verdict for the defendant, severally stating that they could not conscientiously do so, whereupon the court said: "Very well. You may retire to your room, and return with such a verdict as you may find." The jury accordingly retired, but were recalled into court at a later hour, and directed again to return a verdict for the defendant; but, one juror still holding out, counsel for the plaintiff was permitted to stipulate of record that a judgment of dismissal might be entered, to have the same force and effect, and none other, than a verdict for the defendant under the direction of the court, but that plaintiff should be considered as excepting to such direction, and also to such order of dismissal, and thereupon the court ordered such dismissal, and the plaintiff thereupon excepted to such ruling. The stipulation should not have been accepted. The authority and duty of a judge to direct a verdict for one party or the other, when,

in his opinion, the state of the evidence requires it, is beyond dispute; and it is not for jurors to disobey, nor for attorneys to object, except in the orderly way necessary to save the right to prosecute a writ of error. The conduct of the juror in this instance was in the highest degree reprehensible, and might well have subjected him, and any who encouraged him to persist in his course, to punishment for contempt. His conduct was in violation of law, subversive of authority, and obstructive of the orderly administration of justice. In fact, by his course he put in jeopardy the interests which he assumed to protect, because it is only by treating the case as if the verdict directed had been returned that we have been able to review the judgment and to order a new trial. We deem it proper to observe here that it is not essential that there be a written verdict signed by jurors or by a foreman, and we have no doubt that, in cases where the court thinks it right to do so, it may announce its conclusion in the presence of the jury and of the parties or their representatives, and direct the entry of a verdict without asking the formal assent of the jury. Until a case has been submitted to the jury for its decision upon disputed facts, the authority of the court, for all the purposes of the trial, is, at every step, necessarily absolute; and its ruling upon every proposition, including the question whether, upon the evidence, the case is one for the jury, must be conclusive until, upon writ of error, it shall be set aside. That remedy is provided by law, and presumably will be effective and adequate, if there be just ground for invoking it. Certainly the obstinacy of a conceited juror is not likely to prove a wholesome substitute. The judgment is reversed and the case remanded, with instructions to grant a new trial.

[JENKINS, J., dissented on other grounds.]

CHAPTER XI.

INSTRUCTING THE JURY.

SECTION 1. QUESTIONS OF LAW AND FACT.

(a) *General Theory of Division of Functions Between Court and Jury.*

STATE V. WRIGHT.

*Supreme Judicial Court of Maine. 1863.
53 Maine, 328.*

The defendant was indicted, tried and convicted of murder in the first degree, at the October term, 1863, WALTON, J., presiding.

The case came before this Court on exceptions which appear in the opinion.

WALTON, J.—The most important question raised by the bill of exceptions in this case is whether, in the trial of criminal cases, the jury may rightfully disregard the instructions of the Court, in matters of law, and, if they think the instructions wrong, convict or acquit contrary to such instructions. In other words, whether they are the ultimate, rightful and paramount judges of the law as well as the facts.

Our conclusion is that such a doctrine cannot be maintained; that it is contrary to the fundamental maxims of the common law; contrary to the uniform practice of the highest courts of judicature in Great Britain, where our jury system originated and matured; contrary to a vast preponderance of judicial authority in this country; contrary to the spirit and meaning of the constitution of the United States and of this State; contrary to a fair interpretation of our legislative enactment, authorizing the reservation of questions of law for the decision of the law court, and the allowance of exceptions; contrary to reason and fitness, in withdrawing the interpretation of the laws

from those who make it the business and the study of their lives to understand them, and committing it to a class of men who, being drawn from non-professional life for occasional and temporary service only, possess no such qualifications, and whose decisions would be certain to be conflicting in all doubtful cases, and would therefore lead to endless confusion and perpetual uncertainty.

1. *It is contrary to the fundamental maxims of the common law.* It was very early provided that the jury should not entangle themselves with questions of law, but confine themselves simply and exclusively to facts. This rule is expressed in the well known maxim, *ad questionem facti non respondent iudices, ad questionem legis non respondent juratores*. It is the office of the judge to instruct the jury in points of law—of the jury to decide on matter of fact. Broom's Legal Maxims, 77. "An invaluable principle of jurisprudence," says Mr. Forsyth, in his History of Trial by Jury, "which, more than anything else, has upheld the character and maintained the efficiency of English juries, as tribunals for judicial investigation of truth." The author says it is impossible to uphold the doctrine that the jury are in any case to give a verdict according to their own view of the law; that it is founded on a confusion between the ideas of *power* and *right*. "The law," continues he, "cannot depend on the verdict of a jury, whose office is simply to find the truth of disputed facts; and yet such must be the result if they may decide contrary to what the judge, the authorized expounder of the law, lays down for their guidance. This would introduce the most miserable uncertainty as to our rights and liberties, the *misera servitus* of *vagum jus*, and be the most fatal blow that could be struck at the existence of trial by jury." Forsyth's History of Trial by Jury, 259, 265.

2. *It is contrary to the uniform practice of the highest Courts of judicature in England.* Mr. Forsyth, after assigning as a reason for the unpopularity and final disuse of juries in Scandinavia and Germany, that they carried in their very constitution the element of their own destruction, in this, that the whole judicial power,—the right to determine the law as well as the fact,—was in their hands, says: "Far otherwise has been the case in England. Here the jury never usurped the functions of the judge. They were orig-

inally called in to aid the court with information upon questions of fact, in order that the law might be properly applied; and this has continued to be their province to the present day. * * * Hence it is that the English jury flourishes still in all its pristine vigor, while what are improperly called the old juries of the continent have either sunk into decay or been totally abolished." Trial by Jury, July, 11, 12.

Parties have often endeavored to appeal from the court to the jury in matters of law, especially in state prosecutions for treason and libel; but it is believed that no English case can be found in which such an appeal has been sanctioned by the court.

* * * * *

In 1784 the Dean of St. Asaph was indicted for a libel. Lord ERSKINE defended him and insisted that the jury had a right to pass upon the whole issue, including the law as well as the fact. Being overruled by Mr. Justice BULLER, he moved for a new trial for misdirection; and in support of his motion is said to have made one of the most captivating arguments ever listened to in Westminster Hall. But he did not succeed. The judges were unanimously against him.

Lord MANSFIELD, in delivering judgment, declared that in matters of law the judge ought to direct the jury, and the jury ought to follow the direction; that this practice ought not to be shaken by general theoretical arguments or popular declamation; that the jury do not know and are not presumed to know the law; that they do not understand the language in which it is conceived, or the meaning of the terms in which it is expressed; and have no rule to go by but their passions and feelings; that if they should happen to be right it would be by chance only; that to be free is to live under a government of law; that if the law is to be in every case what twelve men who shall happen to be the jury shall be inclined to think, liable to no review, subject to no control, under all the popular prejudices of the day, no man could tell, no counsel could advise, what the result would be; that such a doctrine was contrary to judicial practice, contrary to the fundamental principles constituting trials by jury, contrary to reason and fitness, and he was glad that he was not bound to subscribe to such an absurdity. 3 T. R., 428, note.

3. *It is contrary to a vast preponderance of judicial authority in this country.* Before the revolution the doctrine seems to have met with some favor. It was undoubtedly believed that in the then condition of things it would be safer for the colonies that the power of determining the law should be vested in the jury than to leave it in the hands of the judges. And even after the revolution the doctrine seems to have obtained some currency that in all cases, civil as well as criminal, the jury had a right to determine the law as well as the facts. In a case tried in the Supreme Court of the United States, in 1794, the full Court instructed the jury that they had a right "to determine the law as well as the fact in controversy." This was in a civil suit. *Georgia v. Brailsford*, 3 Dall., 4.

But this mode of administering justice could not continue. The federal courts soon discovered that however useful such a doctrine might have been to us as colonies, it was wholly incompatible with our new and improved system of government under the federal constitution. It was seen that to concede such a power to the jury would deprive the Judges of the Supreme Court of that supremacy in matters of law which the constitution had wisely conferred upon them.

In a case before Mr. Justice BALDWIN, of the Supreme Court of the United States, a man by the name of Shive was tried for counterfeiting notes of the United States Bank. His counsel gravely argued to the jury that they ought to acquit his client on the ground that the act chartering the bank was unconstitutional and void, and that to counterfeit the bills of such an institution was no crime. True, he said, the Supreme Court of the United States had decided otherwise, and, as it was composed of very respectable gentlemen, he would not deny that their opinion was entitled to some consideration; but he contended that, nevertheless, it was the right and the duty of the jury to revise the decision, and if in their judgment it was wrong to disregard it.

Judge BALDWIN at once saw the absurdity of such a doctrine. "Should you assume and exercise this power," said he, in his charge to the jury, "your opinion does not become a supreme law; no one is bound by it; other juries will decide for themselves, and you could not expect that

courts would look to your verdict for the construction of the constitution as to the acts of the legislative or judicial departments of the government; nor that you have the power of declaring what the law is, what acts are criminal, what are innocent, as a rule of action for your fellow citizens or the court. If juries once exercise this power we are without a constitution or laws. One jury has the same power as another. You cannot bind those who may take your places. What you declare constitutional to-day another may declare unconstitutional to-morrow. We shall cease to have a government of law when what is the law depends on the arbitrary and fluctuating opinions of judges and jurors, instead of the standard of the constitution, expounded by the tribunal to which has been referred all cases arising under the constitution, laws and treaties of the United States." *United States v. Shive*, 1 Bald., 512.

In *United States v. Battiste*, 2 Sum., 243, Judge STORY charged the jury that it was their duty to follow the law as it was laid down by the Court. "I deny," said he, "that in any case, civil or criminal, they have the moral right to decide the law according to their own notions or pleasure. On the contrary, I hold it a most sacred constitutional right of every party accused of a crime that the jury should respond as to the facts, and the Court as to the law. It is the duty of the Court to instruct the jury as to the law, and it is the duty of the jury to follow the law as it is laid down by the Court."

* * * * *

4. *It is unconstitutional.* The constitution of the United States confers upon the Judges of the Supreme Court the power to adjudicate and finally determine all questions of law properly brought before them. To allow juries to revise, and, if they think proper, overrule these adjudications, would deprive them of their final and authoritative character, and thus destroy the constitutional functions of the Court.

The Supreme Court of the United States and of this State have decided that prohibitory liquor laws, like the one now in force in this State, are constitutional. Is it within the legitimate power of each successive jury impanelled to try a liquor case, to reconsider that question, and, if they think proper, overrule those decisions? Is

each successive jury impannelled to try a person charged with counterfeiting our national currency, to be told that they may rightfully disregard the decisions of the Supreme Court of the United States and the rulings of the presiding Judge, if they, in the exercise of their own judgment, think them wrong, and acquit the defendant upon the ground that the Act of Congress authorizing our national banks is unconstitutional? Every intelligent mind must perceive that it is impossible to maintain such a doctrine.

Law should be certain. It is the rule by which we are to govern our conduct. To enable us to do so we must know what the law is. Doubtful points ought therefore to be settled, not for the purpose of a single trial only, but finally and definitely. If each successive jury may decide the law for itself, how will doubtful points ever become settled? They will be bound by no precedents. They may not only disregard the instructions of the presiding Judge, and the verdicts of all former juries, but they may also disregard the decisions of the law court. They will be authorized to construe statutes, declare the meaning of technical terms, and pass upon the constitutionality of legislative and congressional enactments, and acquit or convict according to their own view of the law. In doubtful cases—cases where authoritative expositions of the law are most needed—we should undoubtedly have conflicting verdicts, and the law would remain in perpetual uncertainty.

Difficult and important questions of law arise in criminal as well as civil suits. There is scarcely an Act of Congress, or of our State Legislature, the construction, interpretation or validity of which may not be brought in question in a criminal prosecution. Technical terms are to be explained, conflicting provisions reconciled, their prospective or retrospective operations ascertained, their effect to repeal or restore former statutes considered, and their constitutionality determined. To do this often requires much time, careful thought, the examination of numerous authorities, and a familiarity with the law as a science which a lifetime of preparatory study is scarcely sufficient to supply.

Juries are generally composed of upright men, willing and anxious to discharge their duty to the best of their ability. But they are drawn from non-professional life,

and lack the advantage of a legal education. When a cause is finally committed to them they are put under duress of an officer, and are not allowed to separate till their consideration of the case is closed. They are not allowed the use of books, not even the statutes which they may be required to construe. Twelve men thus situated may be admirably qualified to weigh evidence and determine facts, and may be justly entitled to all the encomiums passed upon them in that respect; but it is impossible to believe they constitute a suitable tribunal for the determination of important and intricate questions of law.

“The founders of our constitution,” said Chief Justice SHAW, (5 Gray, 235,) “understood, what every reflecting man must understand, from the nature of the law, in its fundamental principles, and in its comprehensive details, that it is a science, requiring a long course of preparatory training, of profound study and active practice, to be expected of no one who has not dedicated his life to its pursuit; they well understood that no safe system of jurisprudence could be established, that no judiciary department of government could be constituted without bringing into its service jurists thus trained and qualified. The judiciary department was intended to be permanent and co-extensive with the other departments of government, and, as far as practicable, independent of them; and therefore, it is not competent for the Legislature to take the power of deciding the law from this judiciary department, and vest it in other bodies of men, juries, occasionally and temporarily called to attend courts, for the performance of very important duties indeed, but duties very different from those of judges, and requiring different qualifications.”

* * * * *

Origin of the doctrine. The doctrine that the jury are judges of the law in criminal cases originated in a controversy in relation to the law of libel. The doctrine of implied malice, which, when applied to homicides, has been resisted by some of the best judicial minds in this country and in England, was exceedingly distasteful to the defendants, when applied to libels. The Judges, (in England,) formerly held that the character of the publication,—that is, whether it was or was not libellous, was to be deter-

.. mined by the Court; and, if the Court declared it to be libellous, then malice was implied and need not be proved; and, what was still more objectionable, the Judges were in the habit of directing the jury to return a verdict of guilty upon proof of publication and the truth of the *innuendos*, without telling the jury whether the paper was or was not a libel, and without permitting the jury to determine that question for themselves; and then putting the defendant to the trouble and expense of moving in arrest of judgment, or suing out a writ of error, if he thought the publication innocent. Thus, in the trial of the Dean of St. Asaph, for publishing a very harmless pamphlet, entitled a dialogue between a gentleman and a farmer, written by Sir William Jones, Mr. Justice BULLER told the jury that it was no part of their duty to form any opinion as to the character of the pamphlet, or the motives of the defendant in publishing it, and did not himself express any opinion upon these points; and, after long and vexatious litigation, judgment was finally arrested, because not a single sentence in the whole pamphlet could be pointed out that was libellous. If the Judge had told the jury that the pamphlet was not libellous, or had allowed them to determine that question for themselves, or had allowed them to pass upon the question of malice, the defendant would have been acquitted at the trial. This manner of trying libel suits led to a controversy in relation to the law of libel, which lasted for more than half a century in England; and finally resulted in an Act of Parliament, known in history as "Fox's Libel Act," declaring the right of the jury to pass upon the whole issue, and the duty of the Court to give their opinion and direction to the jury, as in other criminal cases. But this Act has never been construed in England as giving the jury the right to determine the law, even in libel suits. "The judge is the judge of the law in libel as in all other cases," said the Court in *Rex v. Burdett*, 4 Barn. & Ald., 131. It was passed to correct the practice of requiring the jury to return a general verdict of guilty without the sanction of the judge's opinion that it was one warranted by law.

In the course of this controversy the argument was invented and urged with great plausibility by Lord Erskine, that, in all cases tried under the general issue, the jury had a right to determine the law as well as the facts. But this

doctrine never met with favor in England. The principal ground relied upon was, not that the jury were judges of the law, but that the malicious intent with which a libel is always charged to have been made, is a question of fact and not a question of law; and the judges were charged with invading the province of the jury, not in withholding from them the decision of questions of law, but in withholding from them the decision of a question of fact; and it was upon this ground that the advocates of the right of the jury to pass upon the whole issue in libel suits, and to have the opinion of the Court whether the facts, if proved, would or would not warrant a verdict of guilty, finally triumphed.

In this country the right of the jury to pass upon the whole issue in prosecutions for libel is universally admitted. In this and many other States it is secured by constitutional provisions. In many of the constitutions it is provided that the jury may do this "under the direction of the Court," or "after having received the direction of the Court." The latter is the form of expression in this State. Upon these and similar provisions the question has been frequently raised, whether the jury are bound to follow the directions of the Court in matters of law, or are at liberty to disregard them, and determine the law for themselves. "Upon this point," says Mr. Greenleaf, "the decisions are not entirely uniform; and some of them are not perfectly clear from the want of discriminating between the power possessed by the jury to find a general verdict, contrary to the direction of the Court in a matter of law, without being accountable for so doing, and their *right* so to do, without a violation of their oath and duty. But the weight of opinion is vastly against the right of the jury in any case, to disregard the law as stated to them by the Court; and, on the contrary, is in favor of their duty to be governed by such rules as the Court may declare to be the law of the land; the meaning of the constitutional provisions being merely this, that the jury are the sole judges of all the facts involved in the issue, and of the application of the law to the particular case." 3 Greenl., Ev., sec. 179.

We thus see that the doctrine that the jury are judges of the law as well as the facts in criminal cases, is contrary to the fundamental principles of the common law,

contrary to a vast preponderance of judicial authority, contrary to reason and fitness; and, if allowed to prevail, will destroy the constitutional functions of the judicial department of the government. Whether under the provisions of our State constitution they may do so in prosecutions for libel, we express no opinion; but in all other criminal prosecutions we have no hesitation in saying it is the duty of the jury to be governed by the law as it is laid down by the court. We fully concur in the opinion expressed by Chief Justice SHAW, (5 Gray, 198,) that, "the true glory and excellence of trial by jury is this: that the power of deciding fact and law is wisely divided; that the authority to decide questions of law is placed in a body well qualified, by a suitable course of training, to decide all questions of law; and another body, well qualified for the duty, is charged with deciding all questions of fact, definitively; and whilst each, within its own sphere, performs the duty entrusted to it, such a trial affords the best possible security for a safe administration of justice and the security of public and private rights."

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Exceptions overruled.

Judgment on the verdict.

APPLETON, C. J., CUTTING, KENT, DICKERSON, BARROWS and DANFORTH, J. J., concurred.

(b) *Questions of Law Not to be Submitted to the Jury.*

AARON V. MISSOURI AND KANSAS TELEPHONE COMPANY.

Supreme Court of Kansas. 1911.

84 Kansas, 117.

The opinion of the court was delivered by

JOHNSTON, C. J.: The appellees, Michael Aaron and Jeanette Aaron, recovered a judgment for \$10,000 against the appellant, the Missouri and Kansas Telephone Company, for the violation of its duty to their son, Walter,

through which he lost his life. The action was brought against the appellant and the Delaware Mutual Telephone Company, of Lansing, but before the case was submitted to the jury the Delaware Mutual Telephone Company was dismissed from the case. In the petition it was alleged that Walter Aaron was an employee of the Delaware company, which, under contract with appellant, had two wires upon the poles of appellant, and that it was the duty of appellant to have proper poles and maintain them in a safe condition for its own operatives as well as those of the Delaware company who found it necessary to climb and work upon them; that appellant had planted new poles along the line and had removed its own wires from the old and attached them to the new poles; that Walter Aaron came along afterward and was transferring the two wires of the Delaware company from the old to the new poles, and that when he had climbed an old pole for that purpose and had stripped the wires from that pole, to which he was strapped, it broke and fell, crushing and killing him. * * *

* * * * *

The testimony included two written contracts between appellant and the Delaware company relating to an interchange of business, the connections to be made, the use of telephones and switchboards, the maintenance of lines, the placing of the wires of one on the poles of the other and fixing the compensation for such use, a provision releasing one from loss or damage caused by wires or fixtures, and containing other stipulations as to the duties of each company and its obligations to the other.

In submitting the case to the jury the court instructed "that if you believe from the evidence in this case that it was the duty of the Missouri and Kansas Telephone Company, under a contract with the Delaware Mutual Telephone Company, to maintain the line of poles in question, including the particular pole in question, in a reasonably safe condition for the linemen of the Delaware Mutual Telephone Company to climb and operate upon; that it failed so to do, and because thereof the death of Walter Aaron was caused, without fault on his part, then I instruct you shall find for the plaintiffs," etc. * * *

The duty of appellant to the Delaware company in respect to the maintenance of the poles, including the one

which fell, depended mainly upon the terms of the contracts between these companies. The contracts were in writing, and their meaning and effect were questions of law, exclusively within the province of the court. To send the jury to a written contract to find the respective duties and obligations of the contracting parties was to leave the jury to decide the law as well as the facts. It was the province of the jury to determine all questions of fact involved in the case, after the court had advised them as to the governing rules of law and instructed them how to apply those rules to the facts brought out in the testimony. To impose on the jury the task of interpreting a contract and of determining the duty and responsibility of appellant under the contract is to require them to perform a function which belongs to the court alone—a duty which it can not surrender or evade. In *Behl v. Keepers*, 37 Kan. 64, it was ruled that “when a written instrument is admitted in evidence, it then becomes the duty of the court to construe and determine its legal effect, the relation of the parties thereto, and to include such determination in the instructions to the jury.” (Syl. Par. 2; see, also, *Brown v. Trust Co.*, 71 Kan. 134.)

The duty of appellant to one employed by and working for another company is not only a matter of law, but it is one of vital consequence in the action. The instruction was little less objectionable than would have been one that if the jury believed the appellant was responsible for the injury and death the plaintiffs were entitled to recover. The instructions required the jury to cover the entire field, including the province of the court, and left them to determine both the law and the facts. It has been held that the failure of the court to define the issues in a case and state them to the jury is error, and likewise it has been decided that to send the jury to the pleadings to learn the issues or contentions of the parties is reversible error. (*Railroad Co. v. Eagan*, 64 Kan. 421; *Stevens v. Maxwell*, 65 Kan. 835; *Railroad Co. v. Dalton*, 66 Kan. 799.) The duty of the court to define to the jury the issues made by the pleadings is no more imperative than to determine the questions of law arising in the case and to state them to the jury. It is in fact a greater departure from good practice to leave the jury to interpret written contracts and determine their

effect on the relations and obligations of the parties than to leave them to ascertain the effect of the pleadings or the issues which they present.

* * * * *

For the error of the court in submitting the case to the jury the case is reversed and the cause remanded for a new trial.

BAKER V. SUMMERS.

Supreme Court of Illinois. 1903.

201 Illinois, 52.

MR. JUSTICE CARTWRIGHT delivered the opinion of the court.

* * * * *

The second instruction told the jury that they should find the issues for the plaintiff if she had established, by a preponderance of the evidence, the material allegations of any of the counts in the amended declaration. There was no instruction telling the jury what the material allegations of the several counts were, and what were the material allegations was a matter of law for the court. Although it is a practice not to be commended for the court to refer the jury to the declaration for the issues, it has not been considered error to make such reference where the instruction requires proof of the averments of the declaration. The proper method is for the court to inform the jury, by the instructions, in a clear and concise manner, as to what material facts must be found to authorize a recovery. The averments in the declaration which would be clear to a lawyer would often be obscure and unintelligible to the average jurymen. (*Moshier v. Kitchell*, 87 Ill. 18.) Where the jury are not only referred to the declaration to determine the issues, but are instructed to find a verdict for the plaintiff if the material allegations of the declaration are proved, they are left to decide, as a matter of law, what are the material allegations, and might conclude that some allegation essential and material in the law was not ma-

terial or necessary to be proved to justify a recovery; and such an instruction as this was held to be undoubtedly erroneous in *Toledo, St. Louis and Kansas City Railroad v. Bailey*, 145 Ill. 159.

* * * * *

The judgments of the Appellate and Circuit Courts are reversed and the cause is remanded to the Circuit Court.

Reversed and remanded.

ATCHISON, TOPEKA AND SANTA FE RAILWAY
COMPANY V. WOODSON.

Supreme Court of Kansas. 1909.

79 Kansas, 567.

[Arthur Woodson, on June 27, 1905, while a passenger on one of defendant's trains, got into an altercation with a Pullman porter, in the course of which Woodson stabbed the porter, under circumstances not clearly disclosed. Soon afterwards the conductor of the train arrested Woodson, put him off the train at Ottawa and had him locked up in the county jail. Subsequently Woodson was tried for the assault and acquitted. This action was brought for false imprisonment.]¹

The opinion of the court was delivered by

GRAVES, J.: The arrest and detention of the plaintiff, prior to July 1, 1905, was without a complaint or warrant. When the arrest complained of was made the plaintiff was not engaged in the commission of any offense whatever. He was quietly seated in a chair, like other passengers.

The defendant interposed the defense that the conductor, when the arrest was made by him, had probable cause to believe that a felony had been committed, and this belief, if honestly and in good faith entertained, justified the arrest, whether the felony had been committed or not. As indicated by this issue, the pivotal question in the case was whether this alleged probable cause existed or not. This question could not be intelligently determined by the jury unless they understood what in law constitutes probable

¹Statement of facts condensed by the editor.

cause. It was the duty of the court to define this phrase clearly, so that the evidence could be easily applied to such definition by the jury. The only instruction given by the court upon this question, reads:

“If the plaintiff was a passenger on one of the passenger trains of the defendant company, and the conductor of said train arrested the plaintiff and removed him from said train at Ottawa, a station on said road, or removed plaintiff from the train and then caused his arrest and imprisonment, the defendant company would be liable for said arrest and imprisonment if said arrest and imprisonment was false; that is, wrongfully made under the circumstances of the case.”

When is an arrest legally false or wrongful? When may a conductor on a passenger-train, without a warrant, rightfully imprison a passenger while such passenger is conducting himself in a quiet and orderly manner and there are no reasonable grounds to apprehend misconduct on his part? The answer given by the law to the last question is: When the conductor has probable cause for believing that the passenger has committed a felony, and acts in good faith upon such belief. What in a legal sense constitutes probable cause. What is a felony? These questions involve both law and fact, and are vital to the issue presented in this case. The jury are not supposed to know the law, and they should be clearly advised by the court as to the law which governs the case on trial. This was not done, but the law and the fact were both submitted to the jury for their determination. * * * * *

Because of the erroneous and misleading character of the instructions given, * * * * * the judgment of the district court is reversed, with directions to grant a new trial and proceed in accordance with the views herein expressed.

MITCHELL V. TOWN OF FOND DU LAC.

*Supreme Court of Illinois. 1871.**61 Illinois, 174.*

MR. JUSTICE McALLISTER delivered the opinion of the court.

This was assumpsit, brought by appellant as administrator of the estate of William Mitchell, deceased, against appellee, to recover for the support and maintenance by the intestate in his lifetime of one Eliza McFerren, from the 23d of March, 1857, to the 23d of January, 1858, said Eliza being an alleged pauper and resident of the said township.

* * * * *

The first instruction on behalf of appellee is as follows:

“If the jury believe, from the evidence, that the person, Eliza McFerren, was boarded and lodged and furnished with clothing by William Mitchell (whose administrator brings suit) from the 1st day of March, A. D. 1857, until his death in 1858, yet, unless they further believe, from the evidence, that during that time the said Eliza McFerren was a pauper for whose support the defendant was legally liable, or for whose support the defendant had, by its proper officer, contracted to pay the said William Mitchell for during said time, they will find for the defendant.”

This instruction submits to the determination of the jury two questions of law, without any aid from the court, viz.:

First—What shall constitute the legal liability of a town to support a pauper?

Second—Who is the proper officer to make a binding contract on the part of the town for such support by another?

The impropriety of leaving questions of law to the determination of the jury has been so often decided by the courts that the citation of authorities seems unnecessary.

The court should have instructed the jury as to what facts were indispensable to create the legal liability of the town for the support of the person in question, and then told them that if such facts were not established by the evidence, to find for the defendant; and should likewise have informed the jury who the proper officer to bind the town for such support was, and what would be necessary to con-

stitute a contract express or implied, and then left it for them to say whether such officer acted in the premises, and if he did nothing to create a contract within the definition given, that then they should find for the defendant. A majority of the court think the instruction erroneous.

For this error, the judgment of the court below must be reversed and the cause remanded.

Judgment reversed.

WINCHELL V. TOWN OF CAMILLUS.

*Appellate Division of the Supreme Court of New
York. 1905.*

109 New York Appellate Division, 341.

WILLIAMS, J.:

The judgment and order should be reversed upon questions of law only and a new trial granted, with costs to the appellant to abide event.

The action is to recover damages for negligence in permitting a sluiceway across a highway under the traveled part thereof to become filled up so as to set back surface water accustomed to flow through the same upon the plaintiff's premises.

* * * * *

In 1890 the Highway Law (Chap. 568) was passed, and by section 180 of that law the statute of 1881 was repealed to take effect on March 1, 1891. (Id. Sec. 183). Substantially the same provision was substituted for it, however, by section 16 of that law, which is as follows: "Every town shall be liable for all damages to person or property sustained by reason of any defect in its highways or bridges, existing because of the neglect of any commissioner of highways of such town." The basis of the right to recover is here plainly stated to be the neglect of the commissioner and not the town.

The trial court read this section to the jury, and then made the following statement to them: "Now, it is the

contention of the defendant in this case, that the defects therein referred to only relate to the defects in the traveled portions of the highway, or defects affecting the traveler. Now, that contention is one which I leave with you with other matters, as a matter of fact to determine."

This statement in the charge was excepted to by the defendant's counsel, and the court was requested to charge that the defect complained of in the case was not one contemplated by section 16 of the Highway Law, but the court declined so to charge.

The court did charge that no recovery could be had except under the provision of this section. The jury evidently found as matter of fact that the defect complained of *was* within the provisions of this section. Otherwise they could not have rendered a verdict for the plaintiff.

We are unable to perceive how the legal meaning or effect of a statute can be a question of fact for a jury. We had supposed it was always a question of law for the court. There was no dispute in this case as to what the defect was claimed to be, the stopping up of a sluiceway under the traveled part of the highway, and the damage resulting was not to a traveler on the highway, but to an adjacent property owner, the setting of surface water back upon his land, and damaging the same.

The highway was in no way obstructed or interfered with so far as travel along the same was concerned. The defendant's contention was that the defects referred to in the statute related only to the traveled portion of the highway and affecting the traveler, and the court was asked to construe the statute and to instruct the jury as to its meaning so they could follow those instructions in considering the evidence and deciding the case. The court declined to do this and left the jury to construe the statute as a matter of fact and not of law.

We think it was the duty of the court to pass upon questions of law, and that it could not properly refuse to do so. Very likely if the jury decided the law properly, as a question of fact, the defendant was not prejudiced, but we think they went wrong, and held the defendant liable under this section, when it was not liable at all.

* * * * *

There was clearly no legal right to recover in this action, and it was erroneously submitted to the jury.

The motions for nonsuit should have been granted.

All concurred, except McLENNAN, P. J., who dissented in an opinion in which SPRING, J., concurred.

DIDDLE V. CONTINENTAL CASUALTY COMPANY.

Supreme Court of Appeals of West Virginia. 1909.

65 West Virginia, 170.

POFFENBARGER, Judge:

Thomas D. Diddle, insured for the benefit of his wife, Lydia Diddle, in the Continental Casualty Company, for \$2,000.00, was struck by a railway water column, while riding on a railway engine, and killed. His wife brought this action on the policy and recovered a judgment for the sum of \$2,049.30. The defense was predicated on a limited liability clause in the policy, reading as follows: "Where the accident or injury results from voluntary exposure to unnecessary danger or obvious risk or injury, or from the intentional act of the Insured or of any other person; * * * * or (2) where the accidental injury results from or is received while quarreling, fighting or violating the law; * * * * then and in all cases referred to in this Part III, the amount payable shall be one-tenth of the amount which otherwise would be payable under this policy, anything in this policy to the contrary notwithstanding, and subject otherwise to all the conditions in this policy contained." Deeming this clause applicable and controlling, under the circumstances attending the death of the assured, the insurance company tendered the beneficiary \$200.00, one-tenth of the amount of the policy, less \$20.00, due it on account of unpaid premium, which she refused.

* * * * *

The following facts are disclosed by the evidence: The insured was a car-repairer in the shops of the Chesapeake and Ohio Railway Company at Huntington. In the even-

ing of the day he was killed, after the completion of his work, he came out of the shop, walked down the railway track in a westerly direction a short distance, passing the water column, standing midway between two railway tracks, about nine feet apart, and stepped on one of two engines, drawing a train of cars over a switch from the west bound track to the east bound track, as he had often done before. Instead of getting into the cab of the engine, he stood on the step on the outside, holding to a hand-grip, while his body projected or swung from the side of it, and was riding in that way, or he was in the act of climbing into the cab and before he had accomplished it, the engine came to the water column and his body came into violent contact with it. * * * *

* * * * *

Over the objection of the defendant, the court gave one instruction for the plaintiff in which the jury were told, first, that the boarding of the engine was not a violation of the statute, making it criminal to jump on or off of trains; and, second, that they might find a verdict for the plaintiff if they believed from the facts, circumstances and evidence that the water tank was a dangerous obstruction, unless they should further believe that the danger was known to the insured and could have been reasonably expected by him. The court erred in giving the instruction, since the second proposition, involved in it, submitted to the jury a matter which it was the duty of the court to pass upon and declare as a matter of law. Upon the admitted and uncontroverted facts, disclosed by the evidence, the danger and risk were palpably obvious. The insured was bound to know it. The law did not permit him to say, nor the jury to find, that he did not know it, or to excuse him because, though having opportunity for deliberation and voluntary action, he did not make use of the faculty of sight, which would have revealed to him the danger and the risk. There was no basis in the evidence for a finding in favor of the plaintiff. Under such circumstances, it is error to give an instruction telling the jury they may so find. *Kuykendall v. Fisher*, 61 W. Va. 87, 102; *Parker v. Building & Loan Ass'n*, 55 W. Va. 134.

For the errors aforesaid, the judgment will be reversed, the verdict set aside and the case remanded for a new trial.

(c) *Questions of Fact Not to be Taken From the Jury.*

STANDARD COTTON MILLS V. CHEATHAM.

Supreme Court of Georgia. 1906.

125 Georgia, 649.

BECK, J. The petition of Cheatham contained substantially the following allegations; that he was employed by the Standard Cotton Mills to work at certain machines called "carders," which were operated by a belt from a pulley, and it was a part of his duty to clean the machines by opening certain lids thereon, placing his hand inside of the same, and taking therefrom accumulations of trash and lint called "strippings." In order to clean the carders it was necessary to stop them, and this was done by switching the belt from the tight pulley, upon which it worked, to a loose pulley. Plaintiff alleges that he had stopped the machines in the manner described, and had opened the lid and placed his hand inside of one of the carders, when the belt slipped from the loose pulley on to the tight one, the machine started, caught his hand, and mangled it severely * * *

* * * * *

Movant also complains that the court erred in charging the jury as follows: "If the carder machine was stopped by slipping the belt from the tight to the loose pulley, and that was the proper way to stop the machine and keep it stopped until the operator himself slipped the belt from the loose to the tight pulley, if the plaintiff did not know or ought to have known to the contrary, he would have the right to presume that the belt, once shifted from the tight to the loose pulley, and the machine thereby stopped, would remain stopped until again started. That I charge you as correct law, gentlemen, provided the defect was one that the plaintiff could not have discovered by the exercise of ordinary diligence." It is alleged that this portion of the charge was error, "because it was a question for the jury to determine whether the plaintiff would have the right to presume that the belt would stay shifted when once

shifted, considering all the facts before them." And this point seems to be well taken. In charging as here alleged, the trial court went directly in the teeth of the statute which declares that it is error for a trial judge to express or intimate his opinion as to what has or has not been proved (Civil Code, Sec. 4334). We cannot imagine a more direct invasion of the province of the jury than for the court to instruct them that as to one of the facts material to be considered by the jury in passing upon the question as to whether or not the plaintiff himself was guilty of negligence, "he would have the right to presume that the belt, once shifted from the tight to the loose pulley, and the machine thereby stopped, would remain stopped until again started." This did not fall far short of instructing them that if the plaintiff took certain precautions while inserting his hand into a dangerous machine, he had the right to presume that the precautionary measure so taken would be equivalent to the exercise of due care and caution in guarding against an injury that might be brought about by the machine being set in motion. In brief, the court attempted to and did in one breath deal with and dispose of a vital question of fact. If any presumption at all arose as to what would be the effect of shifting the belt in question from the tight to the loose pulley, it was a presumption of fact, and should have been left for the jury's consideration alone, unaided by the court.

* * * * *

Judgment reversed. All the Justices concur, except FISH, C. J., absent.

ILLINOIS CENTRAL RAILROAD COMPANY
V. JOHNSON.

Supreme Court of Illinois. 1906.

221 Illinois, 42.

MR. CHIEF JUSTICE CARTWRIGHT delivered the opinion of the court:

This is an action on the case brought by appellee, as ad-

ministratrix of the estate of her son, Carl Robert George Johnson, in the circuit court of Cook county, to recover damages from appellant for causing his death.

The declaration alleged that the deceased, who was a minor, became a passenger on November 3, 1900, on one of defendant's trains, in the front car next to the engine, at West Pullman station, to be carried to Pullman station; that the train arrived at Pullman station about 7:45 in the evening; that at Pullman station was an elevated platform between the tracks for north-bound and south-bound trains for the use of passengers; that when the train stopped at Pullman the deceased left the car at the forward end, as was customary and as directed by defendant; that the train and car had passed by and beyond said elevated platform, and on leaving the car deceased found himself on the ground a few feet north of the elevated platform between said tracks, with the engine and cars on the east side and a vacant space on the west and a high picket fence across the platform on the south; that the depot and exit were on the west west, and as the deceased went from the place where he alighted, in a westerly and southerly direction, toward the gates, using due care, one of the locomotive engines of the defendant going in a southerly direction on the south-bound track struck and killed him. The plea was the general issue, and upon a trial the jury returned a verdict finding the defendant guilty and assessing plaintiff's damages at \$5000. Judgment was entered on the verdict, and the judgment was affirmed by the Appellate Court for the First District.

* * * * *

The instruction given at the request of the plaintiff which purported to state the relative duties of the parties, the theory of the plaintiff and ground for recovery alleged in the declaration, and the amount of damages which might be awarded, was as follows:

"The jury are instructed, as a matter of law, that if you find, from the evidence, that the defendant corporation was engaged in the business of transporting passengers and freight, for hire, upon a railroad operated by said company, then the law denominated the defendant a common carrier. The court instructs the jury that common carriers of persons are required to do all that human care, vigilance and

foresight can reasonably do, in view of the character and mode of conveyance adopted, to prevent accidents to passengers. So, too, persons who become passengers must at all times exercise ordinary care and caution for their own safety. And if the jury believe, from the evidence in this case, that the defendant was at the time of the accident a common carrier, and if you further believe, from the evidence, that the deceased was a passenger on the defendant's train and in the exercise of due care on his part, if the jury so believe from preponderance of the evidence, and that the defendant carelessly or negligently operated its said train or car by running the same past the station platform, so as to cause the deceased to alight upon the ground and tracks of the defendant instead of upon the platform where the passengers are usually unloaded, and that by reason of such negligent acts, if any are proven by the preponderance of the evidence in the case, of the defendant, their agents, and employees, the deceased, Carl Robert George Johnson, while exercising due care for his safety, if you so find from the preponderance of the evidence, was struck by an engine controlled and operated by the defendant and was then and there killed, then you may find the defendant guilty, and assess the plaintiff damages at such reasonable sum as she may be entitled to recover under all the facts and circumstances proved in the case, not exceeding \$5000."

The instruction was erroneous in three respects. It was proved, and not disputed, that the train ran three or four feet past the north end of the platform, and that deceased alighted upon the ground instead of on the platform where passengers were usually unloaded. The questions in dispute were whether the act of defendant in running past the platform constituted negligence on its part, and whether such act caused the deceased to alight upon the ground at an improper place, or whether he was negligent in going down the steps where he did. They were questions of fact for the jury to determine from the evidence, and it was the exclusive province of the jury to determine whether the act of the defendant was negligent and whether the deceased was guilty of negligence. No other act of the defendant was alleged and no other fact stated in the declaration which could have been construed to be a negligent

one, and the court could not say that either of the parties was negligent as a matter of law. The Appellate Court, in considering whether the evidence warranted the jury in finding the defendant guilty of negligence which caused the injury, expressed no opinion as to whether the running of the train past the station platform constituted negligence or not, but held that the defendant was negligent in the management of the south-bound train, saying that it was the duty of the engineer to have been on the lookout for the north-bound train; that he must have known his train was late; that he ran the train at the rate of from twelve to fifteen miles an hour, and that the evidence tended to show he did not exercise the required degree of care in the operation of his train so as to be able to stop for the safety of passengers getting on or off the north-bound train. There was no averment in the declaration as to the speed of the south-bound train or failure to keep a lookout, or mismanagement of it in any respect. The crossing place for passengers was south of the platform, more than three hundred feet distant, and where the train would have come to a full stop; and if the question as to the management of the south-bound train had been submitted to the jury, they would doubtless have considered the question whether the engineer had, or ought to have had, any reason to expect that a person would be on the track at the north end of the platform. It appears, however, that such questions were not submitted, and that the verdict was based on the negligent character of the act in running past the platform. On that question the instruction assumed both that the act was a careless and negligent one, and that it caused the deceased to alight upon the ground on the tracks of the defendant instead of upon the platform, and it afterwards refers to the acts as "such negligent acts." The plaintiff was entitled to recover if the jury should decide that the act of the defendant was negligent, that it caused the injury, and that the deceased was in the exercise of ordinary care; but it was the exclusive province of the jury to determine those facts, and they should have been submitted to the jury for determination without any intimation or assumption as to the proper conclusion. In the case of *Chicago and Northwestern Railway Co. v. Moranda*, 108 Ill. 576, the court said: "Where there is evidence

before a jury upon which it is legally admissible there may be difference of opinion, it is error to allow any opinion of judge or court to be obtruded upon the jurors to influence their determination." Where the evidentiary facts will justify different conclusions the question of negligence is one of fact, and instructions should always be drawn so as to state the law upon a supposed or hypothetical state of facts, leaving the jury to find the fact. Instructions assuming the existence of any material fact have always been condemned. (*Sherman v. Dutch*, 16 Ill. 283; *Michigan Southern and Northern Indiana Railroad Co. v. Shelton*, 66 id. 424; *Chicago and Eastern Illinois Railroad Co. v. O'Connor*, 119 id. 586; *Swigart v. Hawley*, 140 id. 186; *Illinois Central Railroad Co. v. Griffin*, 184 id. 9; *Allmendinger v. McHie*, 189 id. 308; *Pittsburg, Cincinnati, Chicago and St. Louis Railway Co. v. Banfil*, 206 id. 553.) Under this instruction, when the jury found that the train was run past the platform, they would understand that the court regarded such act to be a careless and negligent operation of the train, and that it caused the deceased to get off the train at the place where he did. It did not call upon the jury, as it should have done, to decide whether the act constituted negligence on the part of the defendant.

* * * * *

Because of the material and prejudicial errors which have been pointed out, the judgments of the Appellate Court and circuit court are reversed and the cause is remanded to the circuit court.

Reversed and remanded.

BUTTRAM V. JACKSON.

Supreme Court of Georgia. 1860.

32 Georgia, 409.

The questions in this case arise out of the following state of facts:

Some time in December in 1857, Ira G. Jackson sold to Andrew J. Buttram a mule, and received in payment there-

for two promissory notes, given by one D. H. Harris, one of the notes dated 10th November, 1857, and due twelve months after date, payable to said Buttram, or bearer, for the sum of \$30.00; the other dated 22d October, 1857, and due 25th December, 1858, payable to Martha McElreath, or bearer, for \$40.00.

On the 22d January, 1859, Jackson instituted suit in Carroll Superior Court, against Buttram, to recover the value of the mule, alleging, in one count of his declaration, that Buttram, at the time of the trade, warranted the notes to be good, and that Harris was perfectly solvent, and that if the notes were not paid by Harris at their maturity, he, Buttram, would pay the amount due on the same, whereas, in truth and in fact, Harris was insolvent at the time, and afterwards absconded, and went to parts unknown.

The defendant pleaded the general issue.

* * * * *

When the testimony and argument had closed, the presiding judge charged the jury, "that if the defendant told the plaintiff, at the time of trading him the notes on Harris, that he considered Harris good, but that he would not be bound, yet he was bound, if Harris was not good at that time, if Jackson took the notes on such representation, although there was no guaranty by defendant to stand good for the notes, the notes being taken by Jackson, who was ignorant of the condition of Harris at the time, whose condition was known to Buttram."

* * * * *

By the Court.—JENKINS, J., delivering the opinion.

* * * * *

Error was further assigned, in the grounds of the motion for a new trial against the charge of the Court as set forth in the statement.

In that charge the presiding judge deemed it necessary, in order to facilitate the application of the law by the jury to the case, to advert to certain facts claimed by one party to have been proven, but the proof of which was denied by the other. This practice is not objectionable; indeed, it is sometimes necessary, to enable the jury to understand clearly the relation existing between the law and the facts of the case; but the utmost caution should be observed to

guard the jury against the inference, that the judge considers any disputed fact to have been proven.

Juries are usually very open to influence from the Bench, and it is right that they should be so; but that influence should never be extended to their conclusions, in matters of fact. A careful analysis of the charge under review makes it apparent that the judge put his reference to some of the facts hypothetically, as “*if the defendant told the plaintiff,*” etc., “*if Harris was not good at that time,*” etc., whilst his reference to other facts was in terms which assume that they were incontestably proven, as “*Jackson, who was ignorant of the condition of Harris, at the time, and whose condition was known to Buttram,*” etc. The hypothetical is the proper form of putting facts in such cases, because it distinctly puts the jury on the inquiry as to those facts; but in relation to other facts, put positively before them, put as facts *ascertained* in the same connection, in the same sentence, they are much less apt to feel the necessity of inquiry. Indeed, these different modes of treating different facts, would seem to give a double assurance, that they are relieved from the necessity of scrutinizing the evidence for the proof of some of them: 1st. Because the judge has treated them as proven. 2nd. Because he has cautiously treated others as doubtful. We think there was error in this * * *

The judgment of the Court, therefore, must be reversed and a new trial ordered.

Let the judgment be reversed.

(d) *Comments by the Court on the Weight of the Evidence.*

NEW YORK FIREMEN INSURANCE COMPANY
V. WALDEN.

Court for the Trial of Impeachments and the Correction of Errors in the State of New York. 1815.

12 Johnson, 513.

This cause came up from the Supreme Court on a writ of error.

* * * * *

For the plaintiffs in error, it was contended. 1. That there was a concealment of certain letters and matters, relative to the conduct and character of the master, which were material to the risk, and ought to have been disclosed to the plaintiffs in error, at the time the policy was underwritten. * * * 2. That under the circumstances of the case, the policy did not protect the ship against the barratry of Cartwright, the master; and that there was not sufficient evidence of barratry to entitle the plaintiffs below to recover on that ground * * *. 3. That the materiality of the concealment was a question of fact, and ought to have been left to the jury. * * *

THE CHANCELLOR. This case comes up upon a bill of exceptions, and we are accordingly to be confined to the objections taken at the trial, and appearing on the face of the bill. The question is, whether there was error in the charge which the learned judge delivered to the jury. This charge was, "that the several matters given in evidence on the part of the plaintiffs, were, in his opinion, conclusive evidence of the *barratry* of the master of the vessel, on the voyage; and that the plaintiffs were not bound to communicate, or disclose, to the defendants, any of the letters, matters, or circumstances, which were, at the time of the insurance, in their possession, relative to the master; and that the matters given in evidence, on the part of the defendants, were not sufficient to maintain the issue on their part, or to bar the action of the plaintiffs; and that if the jury agreed with him in opinion, they ought to find a verdict for the plaintiffs;" and with that charge, he left the matter to the jury.

The counsel went at large into the discussion of the question, whether the assured were bound to communicate to the underwriters, at the time they applied for insurance, the letters and other knowledge they possessed of the improper conduct of the master. But it appears to me that this question is not for the decision of this Court, because, whether the circumstances relative to the master ought to have been disclosed, depends upon the question, whether those circumstances were material to the risk; and the materiality is a question of fact for a jury and not a question of law for the Court. It is a well-settled principle in the

law of insurance, that what facts, in the knowledge of the assured, are material, and necessary to be communicated to the underwriter, when insurance is asked for, is for a jury to determine; and I will briefly notice a few cases, in illustration of this point. My whole opinion will rest upon the admission and the solidity of this principle.

* * * * *

It is thus settled, (as far as authority goes,) beyond all doubt or contradiction, that, whether the matters not disclosed in this case were material, was a question that ought to have been submitted to the consideration and decision of the jury; and here, I apprehend, lies the error committed by the learned judge, that he has given a binding direction to the jury, upon matter of fact, as if it had been matter of law. It appears to me, that the true and necessary construction of the charge, as stated in the bill, is, that it was a positive direction, in point of law, as to the materiality of the non-disclosure, and that it must have been so received and obeyed by the jury. If the charge had been intended as a mere opinion to the jury, on a matter of fact, on which they were to exercise their judgment, the jury would, undoubtedly, have been told, that the defence in the case rested upon the question of the materiality of the letters and facts not disclosed, and that it was for them to judge, from the evidence, whether the disclosure would have varied the premium, or increased the risk, in respect of the barratry of the master; and that if the jury should be of opinion that the facts not disclosed were in that sense material, they must find for the defendants; and that, if they thought otherwise, they must find for the plaintiffs. This would have been the language of a charge suited to the submission of such a point; and we have an example of this species of charge (if, indeed, an example can be wanting) in the bill of exceptions taken in the case of *Smith v. Carrington*, (4 Cranch, 64.) If, then, the judge had deemed it proper to add his own opinion on that fact, for the assistance or satisfaction of the jury, it might have been done with utility, and with safety. But the charge, as stated in the case, is not of this nature, but it is in the usual style and language of a direction of the Court, on matter of law. The precedent of a bill of exceptions, which was cited from Buller's N. P. 317, and which is given

as for misdirection, is in the language of the charge in this case. "And the said chief justice did then and there (says the precedent) declare and deliver his opinion to the jury, that the said several matters so produced and proved, on the part of the defendants, were not, upon the whole case, sufficient to bar the plaintiff of his action; and, with that direction, left the same to the jury." There is a precedent of a bill of exceptions given in 3 Burr. 1742., and which was taken to a charge on the subject of search-warrants, made by Lord Camden, when Ch. J. of the C. B., and the language of this very authentic precedent is almost in the very words of the one before us: "And the said chief justice did then and there declare and deliver his opinion to the jury, that the said several matters so produced and proved, on the part of the defendants, were not, upon the whole case, sufficient to bar the action, and, with that opinion, left the same to the jury."

In this case, from *Burrow*, it was never doubted but that the opinion of the chief justice, so stated in that bill, was taken and received as a direction in point of law; and if the charge in the case before us is not to be deemed of that character, it will be impossible, hereafter, to discriminate between a charge containing a positive direction in point of law, and mere advice on a matter of fact. I shall not enter into any minute criticism on words. No one who consults the precedents can well be at a loss for the meaning of this charge. The language of the learned judge was, that the plaintiffs were not *bound* or *required* to make the disclosure; that the matters offered in evidence were *not sufficient* to bar the action, and nothing was said about the *weight of evidence* for the consideration of the jury. If even it was doubtful, by the bill, whether the charge was intended as *direction*, or otherwise, the result of my opinion would be the same; because, when the judge interposes his opinion to the jury, on a point of fact, it ought not to be left in doubt in what light they are to receive his charge. In order to preserve a just balance between the distinct powers of the Court and the jury, and that the parties may enjoy, in unimpaired vigor, their constitutional right of having the law decided by the Court, and of having the fact decided by the jury, every charge should distinguish clearly between the law and the fact, so that the jury cannot misun-

derstand their rights or their duty, nor mistake the opinion of the judge upon matter of fact, for his direction in point of law. The distinction is all important to the jury. The direction of the judge, in the one case, is obligatory upon their consciences, and so they will, and so they ought to, regard it; but his opinion, in the other case, is mere advice, and the jury are bound to decide for themselves, notwithstanding the opinion of the judge, and to follow that opinion no farther than it corresponds with the conclusions of their own judgment. Unless this distinction be kept steadily in view, and be defined with all possible precision, the trial by jury may, in time, be broken down, and rendered nominal and useless.

I am far from wishing to restrain the judges of the Courts of law from expressing freely their opinions to the jury on matters of fact, and still less from interfering with their power of controlling the mistaken verdicts of juries, by a liberal exercise of the discretion of awarding new trials. No man can be more deeply sensible of the value and salutary tendency of this judicial aid and discretion, and none, certainly, can possess higher confidence in the character and wisdom of the Court whose judgment is now under review. All that I feel it my duty to contend for is, that whenever the judge delivers his opinion to the jury on a matter of fact, it shall be delivered as mere opinion, and not as direction, and that the jury shall be left to understand, clearly that *they* are to decide the fact, upon their own view of the evidence, and that the judge interposes his opinion only to aid them in cases of difficulty, or to inspire them with confidence in cases of doubt. It is for this principle that I feel solicitous, and not for anything that may have taken place in this particular cause. The case before us is, comparatively, of trifling consequence; but the distinction I have suggested goes to the very root and essence of trial by jury, and may, indeed, become of inestimable value, and, perhaps, of perilous struggle, when the present generation shall have ceased to exist.

I am disposed to hand to posterity the institution of juries as perfect, in all respects, as we now enjoy it; for I believe it may, in times hereafter, be found to be no inconsiderable security against the systematic influence and tyranny of party spirit, in inferior tribunals.

* * * * *

I am, accordingly, of opinion, that the judgment of the Supreme Court be reversed, and that the cause be remanded, with directions that a *venire de novo* be awarded.

A majority of the Court being of this opinion, it was thereupon ordered and adjudged, that the judgment of the Supreme Court be reversed, and that a *venire de novo* be awarded, for the trial of the issue joined between the parties in the said Court; and that the costs in this Court abide the final decision of the cause.

Judgment of reversal.

ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY V. VICKERS.

Supreme Court of the United States. 1887.

122 United States, 360.

The defendant in error sued the plaintiff in error in a state court of Arkansas to recover damages for personal injuries sustained by him while a passenger on one of the trains of the company. * * *

The case was tried before a jury. * * *

The assignments of error were the following:

1. The court erred in instructing the jury as follows: "Counsel for the plaintiff told you that you might find a verdict for plaintiff for any sum from one cent to \$25,000. This is true in one sense. You have the power to render a verdict for one cent or for \$25,000, but a verdict for either of these sums would obviously be a false verdict, for if the plaintiff is entitled to a verdict at all, and upon this point you will probably have no difficulty, as the evidence clearly shows negligence and consequent liability on the defendant, though this is a question of fact exclusively within your province to determine—I say, if plaintiff is entitled to a verdict at all he is entitled to recover more than one cent, and it is equally clear that \$25,000 would be greatly in excess of what he ought to recover."

* * * * *

MR. JOHN F. DILLON for plaintiff in error.

The constitution of Arkansas, Art. VII, Sec. 23, provides that "judges shall not charge juries with regard to matters of fact, but shall declare the law, and in jury trials shall reduce their charge or instructions to writing on the request of either party."

In this case the matters of fact in issue were the alleged negligence of the defendant and contributory negligence of the plaintiff.

We submit that this constitutional provision should be followed by the Federal courts sitting as courts of common law in the state of Arkansas; and that this case is to be distinguished from *Nudd v. Burrows*, 91 U. S. 426, and *Indianapolis Railroad v. Horst*, 93 U. S. 291.

Chief Justice Taney, delivering the opinion of this court in *Mitchell v. Harmony*, 13 How. 115, said: "The practice in this respect differs in different states. In some of them the court neither sums up the evidence in a charge to the jury nor expresses an opinion upon a question of fact. Its charge is strictly confined to questions of law, leaving the evidence to be discussed by counsel, and the facts to be decided by the jury without commentary or opinion by the court. But in most of the states the practice is otherwise; and they have adopted the usage of the English courts of justice, where the judge always sums up the evidence, and points out the conclusions which in his opinion ought to be drawn from it; submitting them, however, to the consideration and judgment of the jury. It is not necessary to inquire which of these modes of proceeding most conduces to the purposes of justice. It is sufficient to say that either of them may be adopted under the laws of Congress. And as it is desirable that the practice in the courts of the United States should conform as nearly as practicable to that of the state in which they are sitting, that mode of proceeding is perhaps to be preferred which, from long established usage and practice, has become the law of the courts of the state."

It is submitted that the act of Congress of June 1, 1872, 17 Stat. 197, Sec. 5, should be construed in harmony with this decision.

It has been repeatedly held in Arkansas that it is error

to assume, in the instructions to the jury, the existence of the facts in issue. *Montgomery v. Erwin*, 24 Ark. 540; *Floyd v. Ricks*, 14 Ark. 286 (S. C. 58 Am. Dec. 374); *State Bank v. McGuire*, 14 Ark. 537; *Atkins v. State*, 16 Ark. 568, 593; *Armistead v. Brooke*, 18 Ark. 521; *Burr v. Williams*, 20 Ark. 171. And that an instruction should not be given which intimates to the jury the opinion of the court as to the weight of the evidence. *Randolph v. McCains' Administrator*, 34 Ark. 696.

Mr. F. W. Compton for defendant in error submitted on his brief.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

This judgment is affirmed on the authority of *Vicksburg and Meridian Railroad Co. v. Putnam*, 118 U. S. 545; *Nudd v. Burrows*, 91 U. S. 426, 441; *Indianapolis etc. Railroad v. Horst*, 93 U. S. 291, 299. A state constitution cannot, any more than a state statute, prohibit the judges of the courts of the United States from charging juries with regard to matters of fact.

Affirmed.

KLEUTSCH V. SECURITY MUTUAL LIFE INSURANCE COMPANY.

Supreme Court of Nebraska. 1904.

72 Nebraska, 75.

BARNES, J. Augusta O. Kleutsch, by her guardian and next friend, and Katherine Kleutsch Mills, commenced an action in the district court for Lancaster County, against the Security Mutual Life Insurance Company of Lincoln, Nebraska, on a policy issued by that company on the life of one George W. Kleutsch, the plaintiffs being the beneficiaries. The case was first tried before his honor, Judge Holmes, and a verdict returned in favor of the plaintiffs for the amount named in the policy. This verdict was set aside and a new trial granted, and from that order the plaintiffs prosecute error. The case was again tried be-

fore his honor, Judge Cornish, and a verdict again returned for the plaintiffs. From an order denying a new trial and a judgment on the verdict, the defendant prosecutes error. * * *

* * * * *

We come now to consider the assignments of error presented by the defendant company. It appears that on the second trial the court instructed the jury as follows:

“In this case the burden of proof is upon the plaintiffs to establish by a preponderance of evidence the payment of the second premium on the policy in suit, which premium was due November 28, 1900, and on which a grace of 30 days in payment was allowed by the terms of the policy. To prove payment the plaintiffs produced the defendant’s receipt for the same. A receipt is evidence of a high grade, to be overcome only by clear and convincing testimony. On the other hand it constitutes only *prima facie* evidence of what it contains, and it is entirely competent and proper for the defendant company to show that the payment in fact was not made, and that the receipt was issued by mistake.”

Defendant contends that this instruction was erroneous; that it was wrong in this, that the court should not have told the jury that “a receipt is evidence of high grade, to be overcome only by clear and convincing testimony.” And it would seem that by this statement the court called the attention of the jury directly to this part of the testimony; in fact, singled it out, commented on its character and weight, and stated that it could only be overcome by clear and convincing evidence. This must have left the impression that the testimony of the defendant’s witnesses, by which they attempted to explain the existence of the receipt, how it came to be issued, and in which they stated positively that the premium which it represented was never paid, was not evidence of such a high grade as the receipt itself, and the jury might therefore well conclude that the *prima facie* evidence of payment, to-wit, the receipt itself, was not overcome thereby. Whatever may be the rule in other jurisdictions, we have frequently held that it was error to single out and to direct the attention of the jury to any particular part of the evidence, and comment on its weight or probative force. In *Smith v. Gardner*, 36 Neb.

741, the question involved was, whether a certain promissory note had been paid. After the death of one of the defendants, the note was found among her papers. The plaintiff testified positively that the note had never been paid, but that the deceased had obtained possession of it on the pretence of examining it, and thereafter fraudulently refused to surrender it. The trial court gave the following instruction: "You are further instructed that the possession of the note by Margaret Green is a strong circumstance to show payment unless explained by the plaintiffs in the action." The court, speaking through Post, J., held this instruction error, and in commenting thereon said:

"We think the giving of the above instruction was error. We do not question the soundness of the proposition that possession of a note by the maker thereof after maturity is *prima facie* evidence of payment, but what is denominated a presumption of payment in such a case is a mere logical inference from the fact of possession, and may be strong or weak, according to the circumstances of the particular case. * * * Possession of the note by the deceased at the time of her death is not only a circumstance tending to prove payment, but from which payment would ordinarily be the logical inference. It is therefore proper in such a case to instruct the jury that possession is presumptive or *prima facie* evidence of payment, which will, if uncontradicted or unexplained, warrant a verdict in favor of the party alleging it. But the force of such presumption must always depend upon the circumstances of the case. It is therefore error to advise the jury that possession of a note by the maker raises a strong presumption of payment or is a strong circumstance to prove payment."

In *Smith v. Meyers*, 52 Neb. 70, which was an action for criminal conversation, the trial court refused to instruct the jury that, "if you find from the evidence that the plaintiff continued to live with his wife after he has heard of her alleged illicit connection with the defendant, the jury is justified in concluding that the plaintiff has condoned the offense of the wife, and this circumstance is entitled to great weight in considering the question of damages the plaintiff has sustained by the wrongful conduct of the defendant, provided the jury shall believe that the defendant has, in fact, committed any wrong against the plaintiff."

This was assigned as error, and in determining that question the court said:

“This instruction was properly refused, because loss of comfort and society of the wife were not the only injuries for which compensatory damages could be awarded. Again, it was not the province of the court to tell the jury what circumstance was ‘entitled to great weight.’ It was for the jury alone to determine the weight to be given the testimony.”

* * * * *

In *Skow v. Locke*, 3 Neb. (Unof.) 176, it was said: “Complaint is next made that the trial court should not have instructed the jury as follows: ‘The jury are instructed that where the testimony of witnesses is irreconcilably conflicting they should give great weight to the surrounding circumstances in determining which witness is entitled to credit.’ This is complained of because it did not confine the attention of the jury to the surrounding circumstances proved at the trial, and also because it sought to instruct them what weight to attach to these circumstances. Defendant in error replies that the instruction complained of was just as good for one party as the other and did not prejudice plaintiff in error; and also says that the cases cited by plaintiff in error are not in point on a general instruction, such as the one complained of. * * * We are constrained to think that the learned trial judge erred in expressing an opinion as to the degree of weight to be attached to the surrounding circumstances in determining the credibility of witnesses.”

In *First Nat. Bank v. Lowrey*, 36 Neb. 290, where the issue was fraud, the jury was told that certain matters particularly mentioned by the instruction were strong evidence of secret trust, and this was held prejudicial because of the singling out of particular evidence on one side. The same rule is announced in *Gillet v. Phelps*, 12 Wis. 437; *Wilcox v. Young*, 66 Mich. 687. See also *Davis v. Lambert*, 69 Neb. 242.

It thus appears that we are fully committed to the rule that it is error to single out a particular part of the evidence and express an opinion as to its weight, its strength or its probative force. In the case at bar the only question in issue was, whether or not the premium on the policy

in suit had been paid for the year 1900. The plaintiffs produced the receipt in question as their proof of such payment. The defendant produced the officers of the company who had charge of its business, as witnesses, and especially its secretary who, it was claimed, had executed and delivered the receipt, in order to explain its existence and overcome its effect. This witness testified positively that the receipt was made out by mistake and enclosed in a letter to the assured, which contained the policy as changed; that it was intended to evidence the payment of the full amount of the premium for the year 1899. In addition to such positive statement, the witness gave evidence of facts surrounding the issuance of the policy, which at least tended to corroborate his further statement that the premium for the year in question was never paid. With the evidence in this condition, the jury were told that the receipt was a "high grade" of evidence "to be overcome only by clear and convincing testimony." It is true that this was followed by a fairly correct statement of the law; and yet we are unable to say that the jury were not influenced to the defendant's prejudice thereby. The instruction appears to fall within the rule announced in the cases above cited, and is not distinguishable from the instructions therein condemned. It thus clearly appears that the court erred in giving the instruction quoted.

As the case will be tried again, it is neither necessary nor proper for us to comment on the weight of the evidence, or discuss any of the other assignments of error contained in the record. For the giving of the instruction complained of, the judgment of the district court is reversed and the cause remanded for a new trial.

Reversed.

STATE V. DICK.

Supreme Court of North Carolina. 1864.

60 North Carolina, 440.

MANLY, J. In looking into the record in this case, two errors appear to have been committed on the trial, for one

of which, at any rate, the prisoner is entitled to a *venire de novo*.

On the trial, a question arose as to the withdrawal of certain confessions of the prisoner. The Court declined withdrawing them, but remarked to the solicitor for the State, that, after the other evidence already given in the cause, he, the solicitor, might withdraw them, if he chose to do so, which the Solicitor declined. This seems to us, to be an expression of opinion, on the part of the Judge, that the case was sufficiently proved without the aid of the confessions. This is not directly asserted, but is a matter of inference plainly from the manner in which the expedient of withdrawing the testimony is suggested. "After the other evidence, already given in the cause, the Solicitor might withdraw," etc. The sense, which we attribute to this language, is that, which his Honor himself seems to have ascribed to it; for he takes pains to explain to the jury, that they were not bound, by any opinion or judgment of his, as to the facts. He endeavored to obviate the effect of his opinion, by announcing, in distinct terms, the jury's independency of him in all matters of fact pertaining to the issue; but this it was not practicable for him to do. The opinion had been expressed, and was incapable of being recalled.

The statute declares, that "no Judge, in delivering a charge to the petit jury, shall give an opinion whether a fact is fully or sufficiently proved, such matters being the true office and province of a jury."

The object is not to inform the jury of their province, but to guard them against any invasion of it.

The division of our Courts of record into two departments—the one, for the judging of the law, the other, for judging of the facts—is a matter lying on the surface of our judicature, and is known to everybody. It was not information on this subject the Legislature intended to furnish; but their purpose was to lay down an inflexible rule of practice—that the Judge of the law should not undertake to decide the facts. If he can not do so directly, he can not indirectly; if not explicitly, he can not by *inuendo*. What we take to be the inadvertence of the Judge, therefore, was not cured of its illicit character by the information which he immediately conveyed. Knowledge on the

part of the jury, of their proper province, is not the criterion for determining the propriety or impropriety of an opinion from the Judge, as to the sufficiency of the proofs. It is the same, whether the jury know their rights or not.

The provision of the law in question, has been in existence since 1796. On the various occasions, when the law has been digested and re-enacted, it has been continued in the same words; and the interpretation which we now give it, is that which has been given it from the beginning. The Judge can not properly express an opinion, whether a fact pertinent to the issue, is sufficiently or insufficiently proved. Many questions of fact, especially inquiries into mental capacity, and frauds, require as much experience, science, and acumen, as the abstruser questions of law; and yet their decision is left by law in the hands of the comparatively inexperienced and unlearned. This, we suppose, has been to maintain undisturbed and inviolate, that popular arbiter of rights, the trial by jury, which was, without some such provision, constantly in danger, from the will of the Judge acting upon men mostly passive in their natures, and disposed to shift off responsibility; and in danger also, from the ever-active principle, that power is always stealing from the many to the few. We impute no intentional wrong to the Judge who tried this case below. The error is one of those casualties, which may happen to the most circumspect in the progress of a trial on the circuit. When once committed, however, it was irrevocable, and the prisoner was entitled to have his case tried by another jury.

* * * * *

This opinion is to be certified to the Superior Court, to the end, that it may take further proceedings according to law.

COMMONWEALTH V. BARRY.

Supreme Judicial Court of Massachusetts. 1864.

9 Allen, 276.

Indictment for keeping and maintaining a tenement in School Street in Boston, used for the illegal sale and il-

legal keeping for sale of intoxicating liquors.

At the trial in the superior court, before Vose, J., all the witnesses were policemen, two of them being officers whose daily beat included School Street. The defendant's counsel, in his argument to the jury, commented with some severity upon their testimony, as the testimony of policemen. The judge in his charge told the jury that the same rules were applicable to policemen as to all other witnesses, in determining the credit to be given to their testimony; that in very many of the cases which had been tried at the present term of the court policemen had been the principal witnesses, and he thought the jury would agree with him in the opinion that in all these cases they had manifested great intelligence, and testified with apparent candor and impartiality.

The jury returned a verdict of guilty, and the defendant alleged exceptions.

BIGELOW, C. J. Upon mature consideration we have come to the conclusion that we cannot give our sanction to the instructions under which this case was submitted to the jury. Viewed in either of the two aspects of which they are susceptible, it appears to us that they cannot be supported, consistently with the rules of law.

If they are to be regarded only as an expression of opinion by the court concerning the credibility of certain witnesses who had testified in other cases than the one on trial, they were clearly of a nature to mislead the jury. The implication from the language of the court is direct and positive, that the jury might properly infer that the witnesses in support of this prosecution were entitled to credit for the reason that other persons engaged in the same occupation had testified with candor and impartiality in the trial of other cases. The objection to this instruction is twofold. In the first place, it authorized the jury to draw an inference which was not a legitimate deduction from the premises. It by no means follows naturally or logically that witnesses employed in the same or similar occupations will testify on all occasions with equal fairness and impartiality. In the next place, the instructions gave the jury to understand that they might travel beyond the case as proved before them, to seek for corroboration and support of the testimony adduced in behalf of the prosecution

in facts which not only were not proved, but which could not have been properly offered in evidence by the government. Nor is this the whole extent of the objection. The facts thus introduced into the case were submitted to the jury with a distinct expression of opinion by the court as to the effect to be given to them, at a stage of the trial when the defendant could not controvert them, and without any opportunity being given to his counsel to address the jury on the weight which was due to them. Such a course of proceeding is certainly unusual, and, as we think, does not accord with the due and orderly conduct of a criminal trial.

But in another aspect it seems to us that the instructions were objectionable. The credibility of the witnesses who had testified in support of the charge in the indictment was a fact which it was the exclusive province of the jury to determine. As essentially affecting their bias, and the credit to be given to their testimony, their occupation and connection with the origin of the prosecution against the defendant might be important elements, and, within proper limits, proper subjects of comment by counsel, and of consideration by the jury. If the instructions are to be construed, as we think they fairly may be, as the expression of the opinion of the court on the degree of credit to which these witnesses were entitled, the court exceeded its authority in stating such opinion to the jury. By Gen. Sts. c. 172, Sec. 15, the duty of charging the jury in criminal cases is specially enjoined upon the court. By Gen. Sts. c. 115, Sec. 5, which is applicable alike to civil and criminal trials, the rule is prescribed by which courts are to be guided in the performance of this duty. It must be admitted that this provision of the statute is not expressed in terms which are free from ambiguity. But although there is a seeming repugnancy in the two branches of the section, we think that they are susceptible of a reasonable interpretation, which will give full force and effect to both of them, and at the same time carry out what seems to have been the manifest purpose of the legislature. It is clear beyond controversy, that the first clause contains a distinct and absolute prohibition, that the "courts shall not charge juries with respect to matters of fact." To reconcile this with the clause that follows, which provides that the courts "may state the testimony and the law," the prohibition

must be regarded as a restraint only on the expression of an opinion by the court on the question whether a particular fact or series of facts involved in the issue of a case is or is not established by the evidence. In other words, it is to be construed so as to prevent courts from interfering with the province of juries by any statement of their own judgment or conclusion upon matters of fact. This construction effectually accomplishes the great object of guarding against any bias or undue influence which might be created in the minds of jurors if the weight of the opinion of the court should be permitted to be thrown into the scale in deciding upon issues of fact. But further than this the legislature did not intend to go. The statute was not designed to deprive the court of all the power to deal with the facts proved. On the contrary, the last clause of the section very clearly contemplates that the duty of the court may not be fully discharged by a mere statement of the law. By providing that the court may also state the testimony, the manifest purpose of the legislature was to recognize and affirm the power and authority of the court, to be exercised according to its discretion, to sum up the evidence, to state its legal effect and bearing on the issues, and to indicate its proper application under the rules of law.

In the case at bar, the court exceeded the limit prescribed by the statute. If the language used by the court was intended to be applicable to the witnesses who had testified in behalf of the prosecution, it was an expression of opinion as to their credibility. As this was a matter of fact, within the exclusive province of the jury to determine, such expression of opinion went beyond a "statement of the testimony," and trenched on prohibited ground, being a charge to the jury "with respect to matters of fact."

We have already said that the occupation of a witness, in connection with other facts, may have a material bearing on the credibility of his testimony in a particular case. But we feel bound to add that we do not intend to express an opinion on the question whether in the case at bar there was any valid ground for calling in question the veracity or candor of the witnesses whom the defendant's counsel sought to impeach. No such point seems to have been raised at the trial, nor are the facts bearing upon it stated

in the exceptions. The inference from the course of the trial, especially from the line of argument which the counsel for the defendant was permitted to take, and from the instructions to the jury, is, that the ground on which the impeachment of the witnesses was placed was deemed to have been proper matter for the consideration of the jury.

*Exceptions sustained.*¹

¹ *Summing up evidence.* The judge may sum up the evidence without infringing the rule against commenting upon the weight of the evidence, and in so doing he may properly "state, analyze, compare and explain the evidence." *Hamlin v. Treat*, (1895) 87 Me. 311, 32 Atl. 909. Some state constitutions couple with the prohibition against charging on the facts an express permission for the judge to state the evidence. Thus, the constitution of Tennessee, Art. 6, Sec. 9, provides: "Judges shall not charge juries with respect to matters of fact, but may state the testimony and declare the law." The California constitution has identically the same provision. Art. VI, Sec. 19.

SECTION 2. SCOPE OF INSTRUCTIONS.

(a) *Relation to Pleadings and Evidence.*

JACKSONVILLE, TAMPA & KEY WEST RAILWAY COMPANY V. NEFF.

Supreme Court of Florida. 1891.

28 Florida, 373.

MABRY, J.:

The appellee, Neff, in April, 1887, sued the appellant railway company in the Circuit Court for Clay County, Florida, for \$5,000 damages for the destruction of certain property of appellee by fire, caused by the alleged escape of sparks from a locomotive engine under the control of appellant * * *

* * * * *

The third point calls in question the correctness of the second charge given for plaintiff below. This charge is as follows: "That if the jury believe from the evidence that without fault or neglect of the plaintiff, defendant's employes negligently permitted a lot of loose dry hay to remain for some time prior to the 18th of March, A. D.

1887, exposed in a box car near plaintiff's property which was set on fire on said day, and that the employes of said defendant railroad company negligently permitted said fire to be communicated from said car so left exposed by said employes to plaintiff's said property, and to burn and destroy the same, the verdict should be for the plaintiff." This charge was excepted to by defendant below. The objection urged by appellant to this charge is, that "it has no relation whatever to the issues raised by the pleadings, and the jury were thereby instructed that if a loss resulted to the plaintiff by reason of a cause of action of which no mention was made in the pleadings, they should find for the plaintiff." * * *

The declaration contains but one count, and the gist of the action as therein stated is, that the defendant company, so neglected and unskillfully managed its engine and the fire and the burning matter therein contained, and said engine was so insufficiently and improperly constructed, that sparks from said fire and portions of said burning matter escaped and flew from said engine to and upon a building in which plaintiff's property was situated, whereby said building and property were burned and totally destroyed. Issue was joined upon all the pleas of defendant. The object of pleading is to ascertain with certainty and precision, the matters of fact which are affirmed on the one hand and denied on the other, and which are mutually proposed and accepted by the parties for decision. It is clear that plaintiff's cause of action is based upon the negligent construction or negligent use of defendant's locomotive engine, whereby sparks and burning matter escaped from it and caused the fire. The question submitted by the pleadings is whether or not defendant caused the fire by reason of a defective engine or the unskillful management of the engine. The negligence of defendant submitted to the jury for investigation by the charge under consideration consists not in causing the fire, but in allowing loose dry hay to remain in a box near plaintiff's property, and in negligently permitting fire to be communicated from said car to plaintiff's property. The origin of the fire is lost sight of in this charge, and under it the jury were authorized to find for the plaintiff although the defendant did not in any way cause the fire, provided they believed that it neg-

ligently permitted loose dry hay to remain in the car near plaintiff's property, and negligently permitted the fire to be communicated from said car to plaintiff's property and destroy it. If it be conceded that this charge embodies a good cause of action against the defendant, it is evident that it is not contained within the issues made by the pleadings. Appellee contends, however, that his right to recover is co-extensive with the case made by the evidence introduced on the trial, and the trial judge was authorized to go outside of the issues joined between the parties and instruct the jury to find for the plaintiff to the extent justified by the evidence. Respectable authorities hold that the pleadings are merely to notify the opposite party of the ground of action or defense, and where a party fails to object to evidence because it is not relevant to the issues, the court is justified in instructing the jury upon the whole evidence, and is not confined in his instructions to the issues made in the pleadings. The correct view, we think, is that the instructions must be confined to the issues made by the pleadings; and this rule has been recognized in our state. In the case of *Porter v. Ferguson*, 4 Fla., 102, an action of assumpsit was instituted by Ferguson against Porter, based upon a verbal agreement by which the former undertook to make and send to the latter, who was a merchant at Key West, arrowroot to be shipped thence to New Orleans, and Porter promised to receive the arrowroot and ship it to New Orleans for sale in that market, and to account to Ferguson for the proceeds. The declaration further averred that in pursuance of such agreement and understanding, Ferguson shipped to Porter 1725 pounds of arrowroot worth \$140, which was received by him, but contrary to said agreement and understanding he shipped it to Charleston and it got lost at sea, by reason whereof the defendant became liable to pay plaintiff the value of said arrowroot. The plea was *non assumpsit*. The following instruction was given for the plaintiff on the trial of that cause, viz.: "If the jury believe from the testimony that it was the usage of trade for consignees for shipment at Key West to insure on goods of others sent to them for shipment, without instructions as to insurance, and that J. Y. Porter shipped the arrowroot in question without insuring it, and it was lost at sea, he was liable for the loss,

and they ought to find for plaintiff." In speaking of this charge this court says: "Now, what has this instruction to do with the issue which the jury were sworn to try? The instruction directs the attention of the jury to a breach of the contract or agreement, when the breach is not put in issue by any plea—a breach, too, which is not alleged in the declaration. The breach alleged is for shipping to Charleston, when he was bound by his undertaking to ship to New Orleans, whereby the goods were lost—the deviation is the gist of the breach; the negligence or omission to effect an insurance on the goods against the perils of the sea, which, by the usage of trade, he should have done is not charged. Whether the instruction is or is not correct in point of law, is here not necessary to be decided—it was not in issue, and therefore, irrelevant, and should not have been given; and if it tended to mislead the jury, and withdraw their minds from the consideration of the true issue it is erroneous. In the case of *McKay v. Friebele*, 8 Fla., 21, the court in speaking of the relevancy of instructions to the issues says: "In order to determine the correctness and appropriateness of an instruction which may be given to the jury, resort must always be had to the evidence upon which the instruction is based. That evidence, whether parol or documentary, is to be found only in the 'bill of exceptions,' whose peculiar office it is to give the incidents occurring in the progress of the trial, from the joining of the issue to the rendition of the verdict. It may be laid down as a general rule, subject to but one exception, that wherever the error complained of is predicated upon the instructions of the court below, the whole evidence, or, at least, so much thereof as forms the basis of the instruction, must appear in the 'bill of exceptions' accompanying the record of the cause. The exception alluded to is where the instruction is manifestly without the limits of the issue joined between the parties, and is likely to mislead the jury in making up their verdict. In such case, no reference to the evidence can be of any avail in determining the correctness of the instructions, and the court may pronounce upon it even in the absence of the bill of exceptions, provided it be properly attested by the signature of the judge below.'" * * *

The judge who presided at the trial of this case pre-

sented by instructions to the jury defendant's liability under the issues raised by the pleadings, but the second instruction presented a view of the case not embraced in the issues and was calculated to mislead the jury in their verdict. We cannot say that the jury did not base their findings against defendant under this instruction. The view of this charge, that defendant is liable if its employes negligently permitted fire to escape from the car to plaintiff's property, would call for further consideration, even if the charge were not obnoxious to the rule above pointed out. Our decision is based, however, upon the view that the instruction under consideration was without the limit of the issues joined between the parties and was likely to mislead the jury in making up their verdict, and was for this reason erroneous.

* * * * *

For the error in giving the second charge in behalf of the plaintiff below, the judgment is reversed, and a new trial awarded.¹

¹ To the same effect see *Kunst v. City of Grafton* (1910) 67 W. Va. 20, 67 S. E. 74; *W. L. Moody & Co. v. Rowland* (1907) 100 Tex. 363, 99 S. W. 1112; *Latourette v. Meldrum* (1907) 49 Ore. 397, 90 Pac. 503; *Goldman v. New York, N. H. & H. R. R. Co.* (1910) 83 Conn. 59, 75 Atl. 148.

HANSON V. KLINE.

Supreme Court of Iowa. 1907.

136 Iowa, 101.

Action at law to recover damages arising out of false representations in connection with an exchange of properties. The defendants, additional to Kline, are W. E. Gray and J. E. Gray, and at the time in question all the parties lived in Rockwell City, Calhoun county. The petition alleges that in July, 1904, plaintiff was the owner of a stock of merchandise in Rockwell City, valued by him at \$2,000, which he was induced by the defendants Gray to trade to the defendant Kline for a farm of one hundred and sixty acres situated in Hayes county, Nebraska. The specific aver-

ment is that defendants entered into a conspiracy to bring about such trade by false representations respecting the Nebraska farm, and that, pursuant thereto, the farm was falsely represented, and the trade thereby accomplished, greatly to his damage. The defendants answered separately, and each denied the charge of fraud as contained in the petition. On the trial plaintiff had a verdict as against all the defendants jointly, on which judgment was entered, and the defendants appeal.—*Reversed and remanded.*

BISHOP, J. The theory of the petition was that the representations claimed to have been made by defendants were made as from personal knowledge—such is the distinct allegation. In a request presented, the defendant asked that the jury be instructed that if the false representations were made as alleged, but that it was stated to plaintiff at the time that they were made on information derived from others, and not on personal knowledge, then plaintiff could not recover. The request was refused, and the jury was instructed strictly on the theory of the petition; that is, they were told that if defendants in representing the condition of the farm did so as of their own personal knowledge, and so stated to plaintiff, and the representation was false, and plaintiff relied on such representation to his damage, the defendant would be liable. And, *contra*, if the representations were not so made as alleged, then plaintiff could not recover. The jury was not otherwise instructed on the subject. We think here was error. Should it be conceded that the instruction given correctly stated the law applicable to the case, the defendants were entitled to a verdict. This is so because there was no evidence on which to base a finding to the contrary, but, as we have seen, plaintiff himself declares that in making the representations alleged defendants expressly disavowed any and all personal knowledge. Hence the proof did not meet the issue. Accordingly, we must go back to the query: Did the instruction correctly state the law applicable to the case? If we are to judge alone from the issues made in pleading, the answer must be in the affirmative. If we are to judge from the issues as developed on the trial, then the call for a negative answer is imperative. We say issues developed on the trial, because it is plain that plaintiff did not go into the trial relying upon representations made as

of the personal knowledge of the defendants. At the very outset, he testified that defendants denied having any personal knowledge. And it is evident that from beginning to end the defendants did not consider that they were called upon to face the strict issue as made by the pleadings. Plaintiff did rely on representations professedly made on information and belief, and defendants trained their forces accordingly. This being true, there arises the further question whether or not it was competent for the court, and its duty, to disregard the strict issue as made in the pleadings, and instruct according as the parties had made the issue on the trial. That it was competent for the court to do so we have no doubt. *Beach v. Wakefield*, 107 Iowa, 567; *Fenner v. Crips*, 109 Iowa, 455. So, also, we think it was its duty to do so, and, in view, of the case presented by the record, that failure amounted to error. Under our system, it is left for the parties to frame the issues, and, if they proceed without objection—and such is the case here—to the trial of an issue not presented by the pleadings, it amounts to a consent to try such issue. The issue is then rightfully in the case. *Mitchell v. Joyce*, 76 Iowa, 449; *Bank v. Boesch*, 90 Iowa, 47; *Beach v. Wakefield*, *supra*; *Erickson v. Fisher*, 51 Minn. 300 (53 N. W. 638). And, the issue being rightfully in the case, the court must instruct upon it. *Potter v. Railway*, 46 Iowa, 399; *Hill v. Aultmann*, 68 Iowa, 630. We must presume that the court was fully advised of the shift in the issue. Attention to the course of the trial as it proceeded was its duty. Moreover, there was before it the request for instruction presented by defendants, and, while not adequately stating the law it was sufficient to arrest attention and call for a proper instruction on the subject. *Kinyon v. Railway*, 118 Iowa, 349. We may add that as the issue made by the pleadings respecting the subject-matter under discussion was, in effect, withdrawn by the parties, such issue should not in any event have been presented to the jury. *Lumber Co. v. Raymond*, 76 Iowa, 225; *Erickson v. Barber*, 83 Iowa, 367.

For the reasons pointed out in this opinion, the judgment appealed from must be, and it is, *reversed*, and the cause is ordered *remanded* for a new trial.¹

¹ To the same effect see *Mitchell v. Samford* (1910) 149 Mo. App. 72, 130 S. W. 99; *Johnson v. Caughren* (1909) 55 Wash. 125, 104 Pac. 170; *Central*

R. R. & Banking Co. v. Attaway (1892) 90 Ga. 656, 16 S. E. 956; Brusie v. Peck Bros. & Co. (1892) 135 N. Y. 622, 32 N. E. 76; Flanders v. Cottrell (1875) 36 Wis. 564.

In *Schwaninger v. McNeeley & Co.* (1906) 44 Wash. 447, 87 Pac. 514, the court said: "When evidence is received without objection upon any particular ground not covered by the complaint, the court may assume that the complaint is as broad as the evidence when charging the jury, and the complaint will be deemed amended to conform with the evidence and charge, since the amendment could have been made as of course at the trial."

But in *Budd v. Hoffheimer* (1873) 52 Mo. 297, it was held that if a party wishes an instruction upon a matter duly proved but not alleged in his pleading, he must first ask leave to amend his pleading to conform with the proof, and unless he does so such an instruction is properly refused.

OWENSBORO WAGON COMPANY V. BOLING.

Court of Appeals of Kentucky. 1908.

32 Kentucky Law Reporter, 816.

NUNN, J. * * *

The petition was sufficient and stated a cause of action. It was alleged that appellee lost his hand by the negligence of appellant's servants superior in authority to him, and particularized the acts and omissions which constituted the negligence—i. e., that he was raised on a farm, was only 18 years old and had never worked with machinery before he was employed by appellant, of which fact he informed appellant's superintendent at the time he employed him; that the rip saw, at which he was placed to perform labor, was defectively constructed in the fastenings and bolts that held it; that it was left unguarded, with nothing to keep his hand from coming in contact with it; and that defendant failed to furnish him a reasonably safe place in which to perform his labor. Appellant filed an answer, controverting all the affirmative matter contained in the petition, and pleaded contributory negligence on the part of appellee. The testimony showed that appellee was, at the time of his employment by appellant, only 18 years of age, and had had no experience in working with machinery, and that he informed appellant's superintendent of this fact; that he was put to off-bearing lumber from a rip saw, and after he had worked 8 days, but not consecutively, he was directed by the foreman, who had authority to do so,

to remove the belt, by the use of a lever, from the pulley which operated the saw to a loose pulley called the "idler," to raise the table, under and through which the saw revolved, and then to remove two taps, or screws, which were situated about 4 and 6 inches from the saw, for the purpose of oiling the machine. In attempting to comply with the directions of the foreman and at the moment he undertook to remove the oil caps, for some reason not explained, the saw cut off his hand.

* * * * *

There was no testimony introduced tending to show that this rip saw or its attachments were defective or out of repair. The only thing that tended in the least to show this was a statement by appellee that the tap, or screw, failed to move, and if it did it is more than probable it was because of his inexperience, especially when all the evidence shows that it was in proper repair and condition. There was no testimony introduced by appellee showing that the saw was improperly guarded. Appellant's testimony showed that it could not have been guarded or made safer than it was. There was no proof that the place at which appellee worked could have been made safe and still have operated the saws. The building in which the saws were located was a large one, and contained many saws of different kinds, and a number of people were working therein. There was no testimony introduced showing or tending to show any negligence or dereliction of duty upon the part of appellant, other than failing to warn and instruct appellee with reference to the dangers incident to his duties and how to avoid same. Yet the court gave eight instructions in which he submitted to the jury all, or about all, the different acts of negligence alleged in the petition. This was calculated to confuse and mislead the jury. As stated, there was but one issue made by the testimony, and the court should have submitted to the jury that issue only. * * * * *

* * * * *

* * * The case is reversed, and remanded for further proceedings consistent herewith.

DOUDA V. CHICAGO, ROCK ISLAND & PACIFIC
RAILWAY COMPANY.*Supreme Court of Iowa. 1909.**141 Iowa, 82.*

LADD, J.—Plaintiff's employment at the time of his injury was that of cleaning out clinkers from the fire boxes of defendant's engines in its roundhouse at Cedar Rapids. The usual method of performing this work was to drop the "dump" by means of a bar from outside the wheels of the engine while it was standing over the ash pit, and to replace the dumping mechanism in the same way. But in this particular instance the plaintiff thought it necessary to crawl under the engine into the ash pit in order to close the dump. He advised the "hostler" in charge of the engine, who was in the engineer's cab, of his intention to go under, having had the engine moved to what he considered a proper place for that purpose, and then proceeded to crawl, feet first, through the narrow opening between the drive wheels and above the side bar or connecting rod. When his body was part way through, the engine moved backwards, and the consequent rising of the side bar pinched or crushed the plaintiff causing the injuries of which he complains. There was a question under the evidence as to whether plaintiff was not guilty of contributory negligence in attempting to go under the engine at all or in attempting to go under it in the manner above described, but there is no complaint as to the instructions with reference to contributory negligence, and that feature of the case may be passed without further notice.

The defendant is alleged to have been negligent in two respects: (1) in that its hostler in charge of the engine, with knowledge that plaintiff was under it, without warning him started, moved, or permitted the engine to move; and (2) the engine was unsafe and defective, in that it would start forward without the lever being moved or steam being turned on or any action of the person in charge, and defendant, knowing this and plaintiff's position, took no precaution to prevent this, but allowed the engine to move, and thereby injure him. The evidence

failed to point out any defect in the engine, or that it had ever started before without steam being turned on, or that defendant had any reason to anticipate such an occurrence. Nevertheless the jury was instructed that if they found "that said locomotive was unsafe and defective, in that it would start after being stopped without moving the lever therefor or turning on the steam for the purpose of starting it, and that it would with the knowledge of defendant or its employes in charge thereof start without any action on the part of those in charge thereof, and the defendant took no precaution or safeguards to prevent its said movements, and that said locomotive was by reason thereof and the careless and negligent acts of the person in charge thereof, without notice or warning or signal to the plaintiff, started and permitted to run upon the body of plaintiff while under said engine and doing said work, and that by reason thereof plaintiff was injured," then, if such injuries were without fault of plaintiff contributing thereto, plaintiff was entitled to recover. Even though this instruction be conceded to be correct in the abstract, the evidence was not such as to authorize it. There was nothing in the record to charge the employees operating the engine with knowledge of any defect therein or to indicate any information concerning it on defendant's part. Even if the engine be conceded to have been defective, this was not shown to have been apparent or discoverable on reasonable inspection, nor does it appear from the evidence that the defect had existed prior to that night, or that defendant was negligent in failing to discover and repair it or in using it in the condition it was in. So that, even though it might be inferred from the moving of this locomotive engine without the application of steam or other agency, if it did so move, that it was then out of repair, there is no basis in the evidence on which to found a charge of negligence against the defendant, unless the doctrine of *res ipsa loquitur* be applied, and this under the peculiar facts of this case was precluded by a previous instruction, "that the accident occurred will not of itself show negligence on the part of defendant, but you should determine the question (defendant's negligence) from all the facts and circumstances before you." Nor does the instruction first quoted proceed on the theory that such doctrine is applic-

able, but exacts specific findings from the evidence constituting the elements of negligence alleged. * * * * *

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For the reasons pointed out, the judgment of the trial court is *reversed*.

BUYKEN V. LEWIS CONSTRUCTION COMPANY.

Supreme Court of Washington. 1909.

51 Washington, 627.

RUDKIN, C. J.—This was an action in trespass to recover damages for sluicing down and removing earth from a certain lot in the city of Seattle owned by the plaintiffs. The defendant admitted the commission of the acts complained of, though not in manner and form as alleged, and pleaded by way of justification that the sluicing was done pursuant to a verbal contract between the plaintiffs and the defendant which was afterward reduced to writing and signed by the defendant, though not by the plaintiffs. The reply denied the plea of justification as set forth in the answer. The cause was submitted to a jury under instructions from the court, and a verdict in favor of the plaintiffs in the sum of \$1,500 was returned. From a judgment on this verdict, the defendant has appealed.

The principal assignment of error arises out of the following charge of the court, which was duly excepted to:

“If you find from the evidence that there was no such contract as alleged by the defendant in its affirmative defense, which is exhibit No. 2 in the case, but do find from the evidence that the acts performed by the defendant upon the said premises of the plaintiffs were performed with the knowledge and consent of the plaintiffs, then I instruct you that the plaintiffs cannot recover for such acts even though in your opinion the plaintiffs have been damaged thereby, *unless you find from the evidence that defendant negligently or carelessly performed the acts and by reason of such negligence and careless performance the plaintiffs had been damaged.*”

The latter part of this instruction is clearly without the issues presented by the pleadings. The action was prosecuted by the respondents solely on the theory that the acts complained of were committed without their knowledge or consent and against their will, and all their testimony was directed toward establishing the allegations of the complaint and proving the amount of the resultant damages. The testimony on the part of the appellant, on the other hand, was in support of its affirmative defense, and in reduction of the claim for damages. The question of negligence in the prosecution of the work was not an issue in the case under the pleadings, nor was it made an issue at any stage of the trial. There was no claim that any particular act committed by the appellant was negligently or carelessly committed, nor was there any attempt to segregate damages resulting from negligence from damages resulting from other and independent causes. The instruction was therefore erroneous, and calls for a reversal of the judgment unless we are able to say that the error was not prejudicial, and this we cannot do. There was a direct conflict in the testimony, and the right of recovery was questionable at least. The jury may have found that the acts committed by the appellant were so committed with the knowledge and consent of the respondents, but that damages resulted from the performance of the work in a manner the jury deemed negligent. Under such circumstances, it is incumbent on this court to order a new trial. *Bernhard v. Reeves*, 6 Wash. 424, 33 Pac. 873; *Comegys v. American Lumber Co.*, 8 Wash. 661, 36 Pac. 1087; *Kirby v. Rainier-Grand Hotel Co.*, 28 Wash. 705, 69 Pac. 378. In *Comegys v. American Lumber Co.*, *supra*, the court said:

“This instruction, although a correct statement of the law in a proper case, was not pertinent to the issues to be determined by the jury. The plaintiff in his complaint had stated the facts constituting his cause of action in accordance with the requirements of the code, and the cause of action stated was based upon an express contract, and could not be proved by showing that the defendant was guilty of a tort. The question as to whether the defendant had converted the property of the plaintiff to its own use, and was, therefore, liable for its value, was not in issue,

and should not have been submitted to the jury. It is not in accordance with either the letter or spirit of the code to permit a plaintiff to allege one state of facts in his complaint and to recover by proof of an entirely different state of facts at the trial.”

The appellant further contends that the court erred in ruling on the competency of one of the witnesses, and in refusing to grant a new trial for insufficiency of the evidence to justify the verdict. The former of these assignments is without merit and the latter is obviated by the reversal of the judgment on other grounds.

For error in the instructions of the court, the judgment is reversed and a new trial ordered.

CHADWICK, FULLERTON, MOUNT, and CROW, J. J., concur.

KARRER V. CITY OF DETROIT.

Supreme Court of Michigan. 1905.

142 Michigan, 331.

[The plaintiff was injured by running his automobile into an excavation in the street at the intersection of Mack avenue and Grand Boulevard, while he was driving north up the boulevard at night. He saw a red light, but thinking it was in the west curb of the boulevard he tried to pass to the east of it, putting on power for the purpose and proceeding at the rate of 8 or 10 miles an hour. In fact the light was at the west end of a trench which extended from the east almost across the boulevard. When the plaintiff discovered the trench he was going too fast to stop his car, which went into the excavation.]¹

HOOKEE, J. * * * * * * * * * * * *

The court also said to the jury:

“The plaintiff in this case desires me to say that the boulevard is used especially for fast riding and for the use of automobiles, and I think, gentlemen of the jury, you may take that in consideration, if your own experience satisfies you of that. I don’t remember what the ordi-

¹Statement of facts by the editor.

nance is relative to that particular part of the street, but doubtless some of you do, and you may have your own experience with reference to the using of the boulevard for that purpose; but I think the whole question, gentlemen, as to the degree of care, becomes a question for you rather than for the court."

This was in effect allowing the personal knowledge of the jurors to have the weight of evidence in the case. It contemplated not only their determination as to the use of the boulevard from their personal observation, but also the character of the ordinances relating thereto. This was erroneous.

* * * * *

The judgment is reversed, and a new trial ordered.

MOORE, C. J., and CARPENTER and MONTGOMERY, J. J.,
concurring with HOOKER, J.



(b) *Emphasis and Disregard of Portions of Evidence.*

TRUSTEES OF SCHOOLS V. YOCH.

Appellate Court of Illinois. 1908.

133 Illinois Appellate, 32.

MR. PRESIDING JUSTICE CREIGHTON delivered the opinion of the court.

This was an action in case, in the Circuit Court of St. Clair county, by appellants against appellees, to recover damages alleged to have resulted to appellants' school house and premises by reason of the failure of appellees to leave proper and sufficient support for the "superincumbent soil" upon which the school house stood. Trial by jury. Verdict in favor of appellees. Judgment in favor of appellees in bar of action and for costs, and ordering execution to issue therefor.

* * * * *

The court gave to the jury the following erroneous instructions on behalf of appellee:

"The court instructs the jury that if you believe, from

the evidence, that the pillars in said mine and the roof in said mine are intact and in good condition under the plaintiffs' premises and for a distance of three hundred feet beyond and adjacent to plaintiffs' premises, then you have a right to take this fact into consideration in determining the question whether the defendants have caused any subsidence of the surface of plaintiffs' land, as alleged in plaintiffs' declaration, or one count thereof, if you believe from the evidence there has been any subsidence in such surface.

* * * * *

The instruction first above quoted contains all the vices of that class of instructions so often condemned by the courts of this State. It singles out particular facts from the other facts in evidence and specially directs the attention of the jury to them. This instruction bore upon a close and controverted issue of fact in the case and it was equally as important in an honest effort to arrive at a just verdict that the jury should take each and every other pertinent fact in evidence "into consideration in determining the question whether the defendants have caused any subsidence of the surface of plaintiffs' land," as it was to take the facts particularly singled out in this instruction. All the evidence admitted bearing upon that issue, was admitted for the consideration of the jury, and it was error to make any detached portion of it or to make any fact which any detached portion of it might tend to prove, more prominent than any other part of the evidence, or other pertinent fact. This instruction gave undue prominence to the facts specified, and magnified their importance, and tended to divert the minds of the jury from the main issue.

Counsel suggest in support of this instruction that: "While it is a well-settled and long-established rule that an instruction should not single out and call attention of the jury to one alleged fact more than another, yet this rule is subject to another one, that each party is entitled to an instruction hypothetically outlining the evidence and state of the case upon which he relies for obtaining a verdict, and directing the jury to find for the party in whose favor they find the facts constituting the cause of action or the defense," and cite: *Chicago City Ry. Co. v. Math,*

114 Ill. App. 353, and *West Chicago Street Ry. Co. v. Dougherty*, 170 Ill. 379. The instruction in the case at bar is not of the class of instructions discussed in either of the cases cited. It does not hypothetically outline either the evidence or the facts of a full defense and direct the jury to find in favor of the defendants in case they find the hypothesis proven by the evidence, as in *Chicago City Ry. Co. v. Math*, *supra*. What it does is to unduly emphasize one feature of a supposed defense. * * * * *

* * * * *

For and on account of the errors in this opinion noted, the judgment of the Circuit Court is reversed and the cause remanded.

Reversed and remanded.

TAUBERT V. TAUBERT.

Supreme Court of Minnesota. 1908.

103 Minnesota, 247.

START, C. J.

This is an action brought by a young man seventeen years old, by his guardian, against his mother, to recover damages for personal injuries which he claims to have sustained while in her employ by reason of her negligence. Verdict for the plaintiff for \$5,000. The defendant appeals from an order of the district court of the county of Hennepin denying her motion for judgment notwithstanding the verdict or for a new trial. The record discloses the fact that the action was defended by an indemnity company, which had issued its policy to the defendant.

The assignments of error raise two general questions: (a) Was the defendant entitled to a directed verdict in her favor? (b) If not, was she entitled to a new trial for errors in the instructions of the trial court to the jury?

* * * * *

2. This brings us to the question whether the defendant is entitled to a new trial on account of alleged errors in the charge of the court to the jury. The defendant urges

several errors in the instructions; but we find it necessary to consider only one of them.

The court charged the jury that: "If you believe the plaintiff's testimony, believe that it is true, and believe that it measures up to the law as I have defined it to you, he would be entitled to recover, although every other witness in the case had lied." It is claimed that this was prejudicial error. It was certainly error, for the reason that it violated the well-settled rule that it is error for a trial court in its instructions to a jury to single out the testimony of a designated witness and lay particular stress upon it, in cases where the evidence is contradictory. 11 Enc. Pl. & Pr. 185; *State v. Yates*, 99 Minn. 461, 109 N. W. 1070. See *Wilkinson v. City of Crookston*, 75 Minn. 184, 77 N. W. 797, and *Harriott v. Holmes*, 77 Minn. 245, 79 N. W. 1003. The reason for the rule is obvious. Each party to an action is entitled to have all the evidence relevant to the issues considered fairly by the jury, and this right is seriously prejudiced, if not defeated, when the court singles out and isolates the testimony of a particular party or witness and gives to it undue importance.

It is, however, urged by the plaintiff that the instruction, even if erroneous, was not prejudicial, when read in connection with the entire charge. It is true that the jury were instructed that they should give fair consideration to all of the testimony in the case; but the instruction complained of was given near the close of the charge, and it was terse, clear, specific, and mandatory in case the jury believed the plaintiff's testimony. It in effect invited the jury to first inquire whether the plaintiff's testimony was true, and directed them that, if they so found, they need not concern themselves about the other testimony in the case, for the reason that if the plaintiff had told the truth he was entitled to recover. Some of the issues of fact in this case were close ones under the evidence, and we are of the opinion that the instruction was not only erroneous, but prejudicial, and for this reason a new trial must be granted.

So ordered.

M'BRIDE V. DES MOINES CITY RAILWAY
COMPANY.

Supreme Court of Iowa. 1907.

134 Iowa, 398.

McLAIN, C. J.—The facts appearing in the record which are essential to the determination of the questions of law raised on this appeal are as follows: Plaintiff's intestate was a member of the paid fire department of the city of Des Moines, and in response to a fire alarm, about half past ten in the morning, with eight other members of the department, he started on a hose wagon from the fire station on Eighth street going north. One Nagle was the driver of the wagon. Plaintiff's intestate rode in his proper place on a running board or step on the west side of the wagon, facing east and near the rear end. As the wagon approached the crossing of Grand avenue running east and west, on which there was a double track of defendant's railway, the driver saw a car coming from the west, and without checking the speed of the wagon drove on across the track on which the car was approaching. The car struck the rear wheel on the west side of the wagon, and deceased was violently thrown to the pavement and his skull was fractured. From this injury he died within a few hours.

1. After stating very elaborately and in great detail the claims of the parties as to the facts bearing upon the question of the negligence of the defendant's motorman, in charge of the car which collided with the hose wagon on which plaintiff's intestate was riding, and defining negligence, the court instructed the jury to consider "whether or not the motorman having charge of the running and operating of the car in question was negligent or not in not stopping or checking the speed of the car before the collision with the fire hose wagon occurred"; and he then proceeded to detail a variety of circumstances which the evidence for plaintiff tended to establish, such as the clearness and calmness of the day, the ringing of the bell on the hose wagon, and the distance at which such bell might

be heard, the rate of speed of the wagon, etc., none of which were controlling on the question of the motorman's negligence. And he concluded the instruction with this sentence:

"After carefully considering these facts, if they be facts, and all other facts and circumstances proved on the trial, if you believe from a preponderance of the evidence that the motorman by the use of the means at his command could have stopped the car, or checked the speed thereof, in time to have avoided the accident, and that he failed to do so, that would be negligence on his part; and his negligence, if he was so negligent, would be the negligence of the defendant, and your verdict should be for the plaintiff, unless you find the deceased, B. McBride, was negligent, and that his own negligence contributed to his injury in any degree, in which case you would find for the defendant."

The first objection urged to this instruction as a whole is that therein the court called to the attention of the jury the facts which the evidence tended to establish favorable to plaintiff's recovery, and omitted special reference to those relating to defendant's theory of the accident. This objection we think was well taken. An instruction was asked on behalf of defendant, calling attention to other circumstances which the evidence tended to establish, which should have been considered as bearing on the motorman's negligence, and which were favorable to defendant's contentions in the case. It was clearly improper for the court to thus emphasize the circumstances from which negligence might be inferred, and omit any reference to circumstances tending to support the opposite inference. Perhaps the court might properly have omitted to catalogue the circumstances which the testimony tended to establish bearing on the question of negligence, and simply have referred in a general way to the facts and circumstances proved on the trial. But in suggesting to the jury that they should take into consideration some of the circumstances which were favorable to the plaintiff, and omitting reference to others favorable to defendant, he put the case unfairly to the jury.

Another serious objection to the instruction is that the portion thereof above set out withdraws from the jury the

question whether the motorman was negligent in not stopping the car or checking the speed thereof in time to have avoided the accident. There could be no question under the evidence as to the ability of the motorman by the use of the means at his command to stop the car or check the speed thereof in time to have avoided the accident, if he had endeavored to do so a sufficient length of time before the accident occurred, nor was there any doubt that he failed to stop the car or check its speed so as to prevent the result of a collision; and the court specifically instructs the jury that this ability on the part of the motorman and his failure to act constituted negligence. The real question in the case was, not whether the motorman could have stopped the car, but whether he was negligent in not doing so; and this was a question for the jury, and not for the court. Had the evidence shown without controversy that the motorman, in the exercise of care, could and should have anticipated the collision long enough beforehand to enable him to stop the car or check its speed so as to avoid the accident, then the instruction might have been correct. But the facts were in dispute. There were circumstances supporting either conclusion, and the question of negligence should have been left to the jury.

It is no answer to this position to say that in the first part of the instruction the jury were told that they must consider whether or not the motorman was negligent in not stopping or checking the speed of the car. After this general statement, the court proceeded to enumerate a large number of circumstances indicating that the motorman was negligent, and then told the jury that if these circumstances were found to be established, and they believed from these and other circumstances proved on the trial that the motorman could have stopped the car, he was negligent. It was not the physical ability of the motorman to stop or check the speed of the car that was in question, but his failure to use due care. The instructions as a whole are lengthy and intricate in their statements, and the one now specially under consideration is particularly obscure, and the bald statement at its conclusion that the motorman was negligent if he could have stopped or checked the speed of the car in time to avoid the accident,

and failed to do so, may very well have been seized upon by the jury as the solution of the whole difficulty. We reach the conclusion that in the two respects pointed out the instruction was erroneous and misleading.

* * * * *

For the errors pointed out in the first division of this opinion, the judgment is reversed.

SEABOARD & ROANOKE RAILROAD COMPANY V. JOYNER'S ADM'R.

Supreme Court of Appeals of Virginia. 1895.

92 Virginia, 354.

KEITH, P., delivered the opinion of the court.

This is an action of trespass on the case, brought in the Circuit Court of the county of Southampton by Joyner's administrator against the Seaboard and Roanoke Railroad Company, to recover damages for the death of the plaintiff's intestate, caused, as alleged, by the negligence of the defendant company. * * *

* * * * *

Nor is there any error in the refusal of the court to grant the instruction asked for by the plaintiff in error, and set out in Bill of Exceptions No. 3, which is in the following words:

"The court instructs the jury that if they believe from the evidence that Sinclair Joyner went upon the track of the defendant company without its consent, and placed himself thereon in such a position as to be struck by a train, then the said Joyner was a trespasser, and guilty of such contributory negligence as will prevent a recovery by his administrator in this action, unless the jury further believe that the accident was caused by the willful negligence of the company."

It will be observed that the hypothetical case upon which this instruction is predicated omits any reference to evidence upon the part of both plaintiff and defendant tend-

ing to prove that before the accident occurred the engineer became aware of the dangerous position of Joyner. The engineer himself admits that, when he had approached to within sixty yards of Joyner, he recognized that the object near the track was not an abandoned tie, as he had supposed, but a man, and that as soon as he made the discovery he used all proper efforts to avert the catastrophe. The evidence upon the part of the defendant in error tends to prove that when at a much greater distance from the body of the deceased, warning of danger was given, which it was the duty of the engineer to heed, but did not. In any aspect of the case, whether in that presented by the plaintiff or defendant, here was a most material fact for the consideration of the jury, upon their determination of which, under proper instructions, depends their reaching a just conclusion in this case. There may be a state of facts under which the instruction as presented would be good law, but, upon the evidence set out in this record, its tendency was to mislead the jury, and it was properly rejected by the court.

* * * * *

We think the judgment of the Circuit Court is without error, and should be affirmed.

BOYCE V. CHICAGO & ALTON RAILROAD COMPANY.

Court of Appeals of Missouri. 1906.

120 Missouri Appeals, 168.

BROADBUSH, P. J.—This is a suit for damages for negligence. The facts of the case are as follows. On the evening of October 16, 1903, the plaintiff, in company with her daughter-in-law, Mrs. Dorothy Boyce, started to go to the opera house in the town of Odessa. They took the usual route on the south side of Mason street, which crosses the defendant's track at its station. When they got to defendant's tracks, they stopped and waited for a passenger

train to go by. They also saw a freight train standing on the passing track, which was cut in two to allow the passing of traffic on the street, which crossed the track parallel with the sidewalk, and to enable foot passengers to continue their journey. At this opening of the train they saw a man dressed in overalls with a railroad lantern in his hand, who appeared to be connected with the train, who told them they "could cross if they wanted to." Whereupon plaintiff started to cross the tracks, at which time the train began to move, which alarmed her, and in order to prevent being crushed between the cars when they came together she got off the sidewalk onto the streetway, trod upon a stone, fell to the ground, but got up in time to get out of the way of the moving cars. She did not discover that she was injured until she got to the opera house, when she says she felt a pain in her ankle, which according to the evidence turned out to be a severe sprain. * * * *

* * * * *

The defendant asked an instruction, which was refused, to the effect that if the woman, who was with plaintiff, saw that the train was about to move and warned her not to proceed, and that thereafter she persisted in attempting to cross the track ahead of the moving train, the finding should be for defendant. The vice of the instruction is that it singles out particular facts, to the exclusion of other facts, upon which the jury are authorized to find a verdict. This left out of consideration the fact that plaintiff had already started to make the passage and, such being the case, it was a question for the jury to say whether it was safest for her to proceed or turn back. We all know from experience that in case of danger it is sometimes a question whether it is safer to proceed or to retreat. And the law will not place a strict construction upon the acts of a person in such a situation because of want of time for deliberation, and because the imminence of peril is calculated to confuse the judgment. It was a question for the jury to say whether she acted in a reasonable and prudent manner under the circumstances.

* * * * *

[Reversed on other grounds.]

LIFE INSURANCE COMPANY OF VIRGINIA V.
HAIRSTON.

Supreme Court of Appeals of Virginia. 1908.

108 Virginia, 832.

Error to a judgment of the Circuit Court of the city of Roanoke in an action of *assumpsit*. Judgment for the plaintiff. Defendant assigns error.

Reversed.

(Instructions given on motion of the plaintiffs.)

“(1). The court instructs the jury, that although you may believe from the evidence that the deceased was found the evening of his death, having convulsions, and that he continued to have them until he died, and that strychnine was found in his stomach, this alone is not sufficient to prove suicide. The defendant company must go further and show that the deceased intentionally and willfully for the purpose of committing suicide, took strychnine, and this must be shown by such evidence as will exclude every reasonable supposition of accidental death, and unless this is so shown from all the evidence you must find for the plaintiff on the issue of suicide.

* * * * *

KEITH, P., delivered the opinion of the court.

S. W. Hairston, as the next friend of certain infants, recovered a judgment against the Life Insurance Company of Virginia in the Circuit Court of the city of Roanoke; and upon the petition of the defendant company the record is now before us to review certain rulings of the trial court.

On the 6th of February, 1906, the company issued a policy of insurance upon the life of David Peter Willis, the father of the infant plaintiffs, in consideration of the application for said policy, which is made a part thereof, and upon condition that the quarterly annual premium of \$20.41 should be paid in advance on the delivery of said policy, which the declaration alleges was duly paid. It is also averred that Willis died on the 23rd of March, 1906, while the policy was in force; that due proof of his death

had been furnished the defendant; that all the conditions of the policy had been complied with; and that, nevertheless, the defendant refused to pay it.

* * * * *

We come now to the instructions given and refused at the trial.

Instruction No. 1 given on behalf of the plaintiff is erroneous, in this, that it is predicated upon only a portion of the facts shown in evidence, bearing upon the question of suicide. It is proper for the court to tell the jury what is the law as applied to a hypothetical statement of facts, but that statement must present the case shown in evidence fairly to the jury. The instruction under consideration tells the jury, that if the deceased on the evening of his death was found in convulsions which continued until he died, and that strychnine was discovered in his stomach, this alone is not sufficient to prove suicide. Another instruction then might have been given presenting another part of the evidence, in which the jury might with propriety be told that it was insufficient to warrant a conviction; while, if all the facts had been grouped in one instruction, a wholly different conclusion should have been reached.

The tendency of such a method of presenting the facts of a case to the jury is to distract and mislead them, and the court should content itself with giving the jury general principles of law and leaving them to apply those principles to the facts in evidence before them, or else it should be careful, if it prefers to present a hypothetical case to the jury, to put before the jurors all the facts bearing upon the issue which the evidence proves or tends to prove.

* * * * *

The judgment of the circuit court must be reversed, the verdict of the jury set aside, and the case remanded for a trial to be had in accordance with the views herein expressed.

Reversed.

SECTION. 3. FORM OF INSTRUCTIONS.

MURPHY V. CENTRAL OF GEORGIA RAILWAY
COMPANY.*Supreme Court of Georgia. 1910.**135 Georgia, 194.*

BECK, J. The dispute between the parties in this case is over a strip of land 20 feet in width and about 1,381 feet in length extending from Glenn street on the north to Shelton street on the south, in the City of Atlanta, the issue being as to whether the same constitutes the eastern edge of a 100-foot right of way of the defendant railroad company or the western third of a 60-foot public road for said distance. The plaintiff, in 1881, acquired title to the lands lying east of and abutting on the strip of land in dispute. He alleged, that at that time this 20-foot strip was a road traveled by the public, and had been so used for more than twenty years; that in 1884, upon petition of citizens, the commissioners of roads and revenues of Fulton county passed an order formally opening and accepting the same as a public road; that upon the passing of this order the petitioner and other abutting landowners on the east, desiring that the road in front of their property should be 60 feet in width, dedicated an additional 40-foot strip for that purpose, adjoining said 20-foot road; that the county authorities took charge of and worked the entire 60-foot road; and that the same has ever since been a public road. A short time prior to the bringing of this suit the defendant railroad company began changing the grade of the 20-foot strip in question and laying its tracks thereon, and the plaintiff filed suit to enjoin any further interference with the alleged 60-foot road in front of his lands and the use of any portion of same by the defendant as its right of way.

* * * * *

It is complained that the court erred in refusing a written request to give in charge to the jury the following: "Any uninterrupted use by the public generally of lands

as a roadway for a period of time extending through 20 years, accompanied by acceptance by public authorities, gives a prescriptive right to the public to such road or highway." We do not think that the failure of the court to instruct the jury in the language of the request was error. It is manifest that the charge which the court refused to give is ambiguous. It is susceptible of two constructions. First, it might be construed to mean that an uninterrupted use by the public generally of lands as a roadway for a period of time extending through twenty years, accompanied by acceptance by the public authorities extending through that period of time, from the beginning to the end thereof, would give a prescriptive right to the public to such road. Second, it might be construed to mean that an uninterrupted use by the public generally of the strip of land in question as a roadway for a period of time extending through 20 years and acceptance by the public authorities at any time within that 20 years, even at or near the close of that period, would give a prescriptive right to the public to such road. These two constructions embody very different statements of the law upon the question involved. If the first construction which might have been placed upon the written request was the statement of the law desired by counsel offering the request to charge, then the principle embodied in the request was sufficiently covered by the charge as given; and as the court might fairly have placed this construction upon the written request, he should not be held to have committed error in refusing to give another charge upon a subject which was already sufficiently covered by his charge as given. If counsel had desired a charge laying down the doctrine as stated in the second construction of the written request, he should have framed it in terms more aptly embodying the principle which he sought to have incorporated in the court's instructions.

* * * * *

Judgment affirmed. All the Justices concur.

PARKER V. NATIONAL MUTUAL BUILDING &
LOAN ASSOCIATION.

Supreme Court of Appeals of West Virginia. 1904.

55 West Virginia, 134.

POFFENBARGER, President:

* * * * *

Bill of exceptions No. 4 contains all the instructions in the record. The argument and references in the bill of exceptions seem to proceed upon the theory of two instructions. Whether given as one or as two is unimportant. The matter is set out in the bill of exceptions as follows: "The court instructs the jury that where an agent is employed to sell real estate for his principal if the agent was the procuring cause of the sale of said real estate the agent is entitled to his commissions, without regard to the extent of his exertions, and although the contract commenced by said agent was consummated by the principal himself or through the intervention of another; and the court further instructs the jury that where a broker or agent employed to negotiate a sale procures a customer for the sale of the said property on the terms proposed by the owner and the principal takes the further proceedings out of the hands of the broker, and completes the sale himself, the agent is nevertheless entitled to his commissions, and the principal cannot deprive him of his rights to compensation by a discharge before the sale is consummated, and this is true where the principal completes the contract with the customer presented by the broker on different terms from those stipulated to the broker."

The legal propositions stated by these instructions are no doubt correct, but they are purely abstract. They make no reference whatever to the evidence, nor do they submit to the jury the finding from the evidence of the facts giving rise to the law enunciated in them. One of them says: "Where a broker or agent employed to negotiate a sale procures a customer for the sale of said property on the terms proposed by the owner, and the principal takes the further proceedings out of the hands of the broker,"

etc., the broker is entitled to his commission. Had the court given this instruction in the concrete instead of the abstract form it would have said: "If the jury believe from the evidence that the defendant employed the plaintiff to sell the property mentioned in the evidence at a certain price, and agreed to pay him, in case he made such sale, a commission, and, in pursuance thereof, the plaintiff procured a customer for the sale of the property on the terms fixed by the defendant, and the defendant prevented him from making the sale by interfering and consummating the sale himself with the customer, they should find for the plaintiff." This would have directed the minds of the jury to the facts necessary to be ascertained by them in order to reach a proper conclusion. An instruction for the defendant embodying the same proposition of law might have been given, and in it the jury would have been told, in substance, that if the plaintiff, acting under such contract of employment, failed to procure such a purchaser, they should find for the defendant. Instructions should apply the law to the facts in the case. "It is not the proper course for the judge to lay down the general principles of law applicable to a case, and leave the jury to apply them; but it is his duty to inform them what the law is as applicable to the facts of the case. An instruction, however pertinent and applicable it may be, is abstract unless it be made to apply, in express terms, either to the attitude of the parties or to the very facts in issue." *Blashfield on Instr. s. 92.* "It is not the province of the judge to impress any particular view of the facts upon the jury, but it is his province to make his charge so directly applicable to the facts as to enable the jury to render a correct verdict. To leave as little room as possible for them to make mistakes in applying the law to the facts, which they may be very liable to do when they have only general abstract propositions given to them in charge, there ought, if possible, to be no room for misunderstanding the charge or its application, and to this end it ought to be specific and direct." *East Tennessee V. & G. R. Co. v. Toppins*, 10 Lea. (Tenn.) 64. "Courts should apply the principles to the facts in evidence, stating the facts hypothetically." *Blashfield on Instr. s. 92.*

Whether the legal proposition should have been in both forms, or only one of them, depends upon whether or not, looking at the evidence introduced, the court could say there was room or ground for either of the two conclusions presented, dependent upon an issue of fact to be determined by the jury. If there is no evidence whatever upon which one of the conclusions may stand, there is no reason for giving an instruction embodying the hypothesis upon which it is based, nor can the court do so except at the risk of confusing and misleading the jury. The statement of the principle without any application of it to the facts or direction to the jury as to what facts they should look for in the evidence, is even more likely to mislead for the reason that, in the effort to apply it, they are called upon by the court to wrestle with both the law and the facts and form for themselves the hypothesis upon which the conclusion depends, and it leaves room for the jury to form two, where there may be no evidence whatever to support one of them. That is exactly what has occurred here. No evidence of the performance of the contract proved was before the jury. The instructions raised and presented to the jury a question which had no root or foundation in the evidence. Hence, it could perform no function except to mislead the jury.

* * * * *

On account of the misleading character of the instructions given and the want of sufficient evidence to support the verdict, the judgment must be reversed, the verdict set aside, a new trial granted, and the case remanded.

Reversed.

WEST KENTUCKY COAL COMPANY V. DAVIS.

Court of Appeals of Kentucky. 1910.

138 Kentucky, 667.

Opinion of the court by WM. ROGERS CLAY, Commissioner.
Reversing.

Appellee, J. B. Davis, instituted this action against appellant, West Kentucky Coal Company, to recover damages for personal injuries alleged to have been caused by appellant's negligence. The trial in the lower court resulted in a verdict and judgment in favor of appellee for the sum of \$1,600. To reverse that judgment this appeal is prosecuted.

The appellant is a corporation operating a coal mine near the town of Sturgis, Union county, Ky. It also owns and operates a mine at Wheatcroft, and at one or two other places. In connection with these mines it owns and operates a railroad. Under appellant's tipple, there are three railroad tracks upon which cars are transported and placed for the purpose of loading. These tracks are known as tracks Nos. 1, 2, and 3. The engine which appellant operates was taken daily down track No. 1 to the scale-house; thence it was run up track No. 2 to the tipple for the purpose of coaling before beginning its regular operations for the day. On the occasion in question, those in charge of the engine backed it down to the scale house on track No. 1; thence up track No. 2, where appellee was at work at the tipple. It was appellee's duty to check the cars, and see that they were properly loaded. When the engine arrived at the tipple, it pushed the car which appellee was loading out of the way, placed its tender upon the tipple, and received its coal. It then went back, placed a partially loaded car in position, and proceeded to the scale-house. It was standing there when appellee resumed his labors of loading the car on track No. 2. According to its usual custom, the engine then started up track No. 1, pushing an empty car. While it was proceeding in the direction of appellee, the car which the latter was loading on track No. 2 became unmanageable. When this took place, appellee's assistant jumped upon the car for the purpose of stopping it. Appellee stepped back and moved up the track for the purpose of notifying the tipple men to stop the machinery. There was a distance of four or five feet between tracks No. 1 and No. 2. When appellee rose up and stepped backward to give the tipple man the required notice, he came in contact with the car which was being pushed by the engine up track No. 1, and was in-

jured. The evidence shows that there was a flagman on the front end of the car that was being pushed by the engine. His testimony is to the effect that appellee backed into the car so suddenly that it was impossible to stop the train after his peril was discovered. There was evidence to the effect that the whistle was not blown nor the bell rung as the engine approached the place of accident.

* * * * *

The instructions complained of are as follows:

“(1) Gentlemen of the jury, the court instructs you that it was the duty of the defendant’s employee in charge of the engine and cars attached thereto at the time and place in question to exercise ordinary care, as hereinafter defined, in running and operating the same so as to prevent injury to its employes; so, if you shall believe from the evidence that defendant’s said employes in charge of said engine and cars failed to exercise such care as above required, but negligently ran said cars against the plaintiff, thereby injuring him, while plaintiff was exercising ordinary care, as hereinafter defined, for his own safety, if he was then doing so, then in that event you should find for the plaintiff and award to him such an amount in damages as will fairly and reasonably compensate him on account of any mental and physical suffering endured by him as a direct result of such injury, if any, and also for the reasonable value of the time necessarily lost from his business on account thereof, if any, and also for any permanent reduction in his power to earn money, if any, as was the direct result of such injury, not exceeding the sum of \$2,000, the amount claimed in the petition. But unless you shall so find and believe from the evidence as above required, you must find for the defendant.”

“(4) The court further instructs you that it was likewise the duty of the plaintiff performing his duties and doing the work in question to exercise ordinary care for his own safety, and, although you may believe from the evidence that the defendant’s said employe was at said time negligent and careless, yet if you shall also believe from the evidence that plaintiff at said time when he was injured was also careless or negligent, and that but for his own carelessness or negligence the accident and injury

would not have occurred, then in that event you should find for the defendant.”

It will be observed that the instructions complained of do not present to the jury the reciprocal duties of appellant and appellee. They are so general and abstract in form as to make the jury the judges of both the law and the facts. *Smith v. Cornett*, 38 S. W. 689, 18 Ky. Law Rep. 818; *C. N. O. & T. P. Ry. Co. v. Hill's Adm'r*, 89 S. W. 523, 28 Ky. Law Rep. 530. The jury may have concluded that certain acts constitute negligence, when, as a matter of fact, such was not the case. That this conclusion is sound may be gathered from the fact that one witness was permitted to testify that the car which struck appellee was not equipped with a fender or pilot; indeed, much stress is laid upon this fact in appellee's brief. Doubtless it was commented upon by counsel in their argument to the jury. We can not, then, say that the jury were not influenced by this fact in returning a verdict in favor of appellee. Certainly the failure of appellant to equip the car in question with a fender or pilot was not negligence. To so hold would be to impose upon appellant a greater liability than has ever been imposed upon ordinary railroads, and would almost defeat the practical operation of its engines and cars.

Nor do we think the failure of appellant to offer more specific instructions than those given deprived it of its right to complain. The rule is that in civil cases the court is only required to give such instructions as are offered by the parties. If, however, an instruction offered is defective in form or substance, the court should prepare, or direct the preparation of a proper instruction on the point attempted to be covered by the instruction offered. *L. & N. R. R. Co. v. Harrod*, 115 Ky. 877, 75 S. W. 233, 25 Ky. Law Rep. 250; *Nicola Bros. v. Hurst*, 88 S. W. 1081, 28 Ky. Law Rep. 87.¹

But when no instructions are requested by either party, and the court on its own motion undertakes to instruct the jury, the instructions so far as they go should present correctly the law of the case. *South Covington & Cincinnati Street Ry. Co. v. Core*, 96 S. W. 562, 29 Ky. Law Rep. 836; *Swope v. Schafer*, 4 S. W. 300, 9 Ky. Law Rep. 160; *Turner, Jr. v. Terrill*, 97 S. W. 396, 30 Ky. Law Rep. 89.

Upon the next trial of the case the court will instruct the jury as follows:

“It was the duty of the defendant’s agents in charge of its engine and cars on the occasion in question to give reasonable warning of the approach of the train by blowing the whistle or ringing the bell, and to keep a reasonable lookout in front of the train as it was moved. It was the duty of the plaintiff to exercise reasonable care to watch for the approaching train and keep out of its way. If you believe from the evidence that a reasonable warning of the approach of the train was not given or a reasonable lookout was not kept, and that by reason of this plaintiff was struck and injured by one of defendant’s cars, while exercising ordinary care for his own safety, you will find for the plaintiff. Unless you so believe, you will find for the defendant.

“(2) Although you may believe from the evidence that defendant’s agents in charge of said train failed to give reasonable warning of its approach and failed to keep a reasonable lookout, yet if you believe from the evidence that the plaintiff himself failed to exercise ordinary care to discover the approach of the train and to keep out of its way, and that such failure on his part, if any, so contributed to his injury that but for said failure his injury, if any, would not have been received, you will find for defendant.

“(3) If you believe from the evidence that a reasonable lookout was kept, and that reasonable warning of the approach of the train was given, and that plaintiff went upon the track so close to the approaching train that the injury to him could not be avoided by the exercise of ordinary care upon the part of those in charge of the train after they perceived his danger, or could have perceived it by the exercise of ordinary care, you will find for the defendant.

“(4) Reasonable or ordinary care is such care as an ordinarily prudent person will usually exercise under circumstances the same or similar to those proven in this case.

“(5) If you find for the plaintiff, you will award him such sum in damages as you may believe from the evidence will fairly compensate him for his mental or physical suf-

fering, if any; for his loss of time, if any; and for the permanent impairment, if any, of his power to earn money, which you may believe from the evidence was the proximate result of his injury, if any; not exceeding in all, however, the sum of \$2,000."

No other instructions will be given.

The judgment is reversed, and cause remanded for a new trial consistent with this opinion.

¹ In *Kansas City, Mexico and Orient Ry. Co. v. Loosley* (1907) 76 Kan. 103, 90 Pac. 990, the court said: "The defendant claims the court erred in refusing its request. The plaintiff argues that the instruction tendered was faulty and hence was properly refused. For present purposes it may be conceded that this is true. It may further be conceded that without a request the court was not obliged to instruct upon the matter involved. But if a defective request actually brings to the court's notice an important principle of law which ought to be stated to enable the jury to render an intelligent verdict, it may be prejudicial error to disregard it; and if an attempt be made by an instruction to submit the subject defectively covered by the request to the consideration of the jury, it should be sufficiently explicit and comprehensive to cover fairly the field of the request."

STATE V. LEGG.

Supreme Court of Appeals of West Virginia. 1906.

59 West Virginia, 315.

SANDERS, Judge:

This writ of error is to a judgment of the circuit court of Clay county, convicting the defendant, Sarah Ann Legg, of the murder of her husband, Jay Legg, and sentencing her to be hanged.

* * * * *

As to instructions Nos. 2, 3, 4 and 5. By these instructions it is undertaken to define reasonable doubt. We see no objection to these instructions as such. They seem to define reasonable doubt correctly, and no objection to their correctness is pointed out. But it is urged that the court erred in giving them, because they are upon the same point, and for the same purpose, and that a continued repetition of instructions upon a single point is calculated to prejudice the defendant. It was entirely unnecessary to repeat these instructions. It is manifestly improper to do so.

The purpose of instructing a jury is to aid them in arriving at a proper verdict, and not to confuse them, and in order to be of aid, instructions should not be repeated, but when once given, presenting a particular theory of a case, no other instruction presenting the same theory should be given, because to do so is to destroy the very purpose for which instructions are given, and to mystify and confuse the jury. It is true these instructions present the definition in different language, but there is no necessity for it to be defined more than once. Four long instructions upon reasonable doubt, which has never yet been defined or made clearer than the words themselves import, can certainly be of no service to a jury. The practice of repeating instructions should be condemned. It is wrong to do this, and thereby prominently impress a single feature of a case upon a juror. Either of these instructions would have been sufficient, but as to whether or not the repetition of them is reversible error, we will not determine, because, on other grounds the judgment will have to be reversed, and upon a second trial, the necessity for this criticism can be obviated.

* * * * *

The judgment of the circuit court is reversed, and a new trial awarded the defendant.

*Reversed.*¹

¹ *Repetition not error unless jury misled.* In *Gran v. Houston* (1895) 45 Nebr. 813, 64 N. W. 245, the court said: "While there may have been repetitions which were not necessities, or which in the opinion of counsel or this court were unnecessary, yet there were none which tended, nor did they as a whole tend, to mislead the jury, nor can we believe the jury was misled by them, hence there was no prejudice to the rights of plaintiff in error, and the action of the court, the grounds for this complaint, furnishes no tenable reason for a reversal of the case."

CITY OF CHICAGO V. MOORE.

*Supreme Court of Illinois. 1891.**139 Illinois, 201.*

MR. JUSTICE SHOPE delivered the opinion of the court:

This was a suit for personal injury, alleged to have been received by defendant because of a defective sidewalk over and upon which she was passing with due care and caution, and which appellant was required to keep in safe repair and condition. The trial resulted in a verdict for plaintiff, which, on appeal to the Appellate Court, was affirmed.

Counsel for appellant have, seemingly, filed in this court their brief filed in the Appellate Court, containing an elaborate discussion of the facts, which must in this court be deemed as being settled adversely to their contention by the judgment of the Appellate Court.

The first point made which we will consider is that, the court erred in refusing all instructions asked, and giving one prepared by the court in lieu thereof. It is insisted with great earnestness, that under the practice in this State, and under the statute, the respective parties have the right to have instructions given or refused by the court as asked by them, and that it is error for the court to refuse an instruction containing a correct proposition of law applicable to the facts, although an instruction embodying every material phase thereof be given in an instruction or instructions prepared by the court. It is said "that there is no place under our law for instructions by the court *sua sponte*, except when counsel have failed to present proper instructions, and the justice of the case demands that the judge supply the omission." The contrary to this contention has been so repeatedly held, and the practice of giving a charge prepared by the court, and containing all of the material points covered by the instructions asked, has been so often commended by this court, that the question ought to be regarded as settled in this state. *Hill et al v. Parsons et al*, 110 Ill. 111; *Hanchett v. Kimbark et al*, 118 id. 132; *Birmingham Fire Ins. Co. v. Pulver*, 126 id. 329.

In the latter case, in speaking of this practice, we said:

“The propriety of the practice thus adopted is challenged, the proposition contended for seeming to be, that in this State the functions of the court in the matter of instructing a jury are practically limited to giving or refusing the written instructions asked by counsel. Such, clearly, is not the case. True, he may, if he sees fit, limit himself to giving the instructions submitted by the counsel which properly state the law, and then, even though the law be inadequately given to the jury, no error can ordinarily be predicated upon such action, because if counsel had deemed other instructions necessary, they might and should have asked them. But where the judge sees proper to do so, it is competent for him to prepare his own charge to the jury, but if he does so, he should embody in it, either literally or in substance, all proper instructions asked by counsel.” See, also, *Chicago and Iowa Railroad Co. v. Lane*, 30 Ill. App. 443.

The statute prescribes that the court charging the jury shall instruct as to the law, only, (Practice act, sec. 51,) and that no judge shall instruct a petit jury unless the instructions be reduced to writing. (Practice act, sec. 52.) Section 54 provides, that when instructions are asked “which the judge can not give,” he shall mark the same refused, “and such as he approves he shall write on the margin thereof, given,” and he is then prohibited from qualifying, modifying or explaining the same, otherwise than in writing. The court must see that the instructions given to the jury, not only separately, but as a whole, conform to the rules of law and practice in our courts. It by no means follows, because an instruction contains a correct proposition of law, that it must meet the approval of the judge, and must therefore be given. Each party to the litigation has a right to demand that the law applicable to his case shall be given with accuracy and clearness to the jury. But this is all that he has a right to demand, and it was early held, under this statute, that the court might refuse erroneous instructions, modify them, or give instructions of its own, as it might deem expedient, (*Vanlandingham v. Huston*, 4 Gilm. 125,) and such has been the uniform holding ever since. And it has been so repeatedly held that it is not error to refuse instructions, however applicable

and pertinent, when the material parts are given in other instructions, that the citation of authority seems unnecessary. Here appellant asked seventeen instructions. A careful consideration of them will show, as it is conceded, that the instruction prepared and given by the court contained every important or material proposition embodied therein, except the fourth instruction asked and refused, in respect of which, as we shall see hereafter, appellant has no cause of complaint. If the jury were accurately instructed in respect of each proposition contained in the instructions asked, proper to be given, the party can not be heard to complain.

It is, however, said, that the instructions prepared by the counsel presented the questions sharply and incisively, while those of the court are more moderate in expression and less forceful. This may be conceded without affecting the result. As said by the Appellate Court: "The instructions handed up come to the judge from partisan hands, and have been drawn as carefully as the skill of a lawyer can accomplish it to present a partisan view, or to convey a hint, suggestion or intimation of advantage to his client. The same legal rule may be stated in a differently arranged combination of words by the judge, and be, as it is very likely to be, coldly impartial, and entirely colorless in its statements of facts on which it is based." The utmost care should be taken by the judge to include within the charge every proposition of law applicable to the facts of the case embraced within the instructions asked, and such others as he may deem necessary to the attainment of justice. His language should be clear and impartial, and convey to the jury the law of the case in terms they will comprehend. When this is done the practice is to be commended, rather than the other, which too frequently leaves the mind of the juror in uncertainty as to what is meant by the disjointed, and, to his mind, disconnected and conflicting, propositions of law, and which embarrass and mislead him perhaps quite as often as they lead him to correct conclusions.

* * * * *

Finding no error in this record for which the judgment should be reversed, it is affirmed.

*Judgment affirmed.*¹

¹ A number of courts have declared that the practice of charging the jury in the language of the court instead of in the language of counsel, is decidedly preferable, even where the requested charges are unexceptionable in law when separately examined, for the reason that thereby the charge can be made more orderly and harmonious and is freed from the partisan spirit and want of proper perspective which instructions usually show when prepared by counsel. *Rosenstein v. Fair Haven v. Westville R. R. Co.* (1905) 78 Conn. 29, 60 Atl. 1061; *Kinney v. Ferguson* (1894) 101 Mich. 178, 59 N. W. 401.

On the other hand, some courts hold that the court is bound to give a correct instruction in the language of the request. Thus, in *Morrison v. Fairmont & Clarksburg Traction Co.* (1906) 60 W. Va. 441, 55 S. E. 669, the court said: "A party is entitled to an instruction in his own language, if it correctly propounds the law applicable to the case, and is not misleading and there are facts in evidence to support it." *State v. Evans*, 30 W. Va. 417; *Jordan v. Benwood*, 42 W. Va. 312. Where such instructions are asked a court should, without hesitation, give them. It is a right a party has to couch his instructions in his own language, and when he has done so, if they fulfill the legal requirements, they should be given. But while this is true, yet what should be the effect after verdict, where such instruction is refused, but modified and given? Can we say that it is reversible error for the court to make a slight or immaterial change in an instruction? Must instructions be given literally as offered, and if this is not done, must we overthrow the verdict? We cannot so hold. While such an instruction should be given, yet a verdict will not be set aside where this is not done, when it is modified and given, if we can clearly see that the instruction as modified is the same in legal effect as the one offered."

And in some states it is provided by statute that the court shall instruct in the language of the request when such request is correct in law. *Alabama, Code, 1903, § 5364; North Dakota, Rev. Codes, 1905, § 7021; South Dakota, Code Civ. Pro., 1903, § 256.*

KLOFSKI V. RAILROAD SUPPLY COMPANY.

Supreme Court of Illinois. 1908.

235 Illinois, 146.

MR. JUSTICE VICKERS delivered the opinion of the court:

* * * * *

The second count in the declaration alleges that appellant carelessly and negligently employed an incompetent and reckless servant and permitted such incompetent servant to operate and manage ladles filled with molten metal; that such incompetency of the said servant was, or ought to have been, known to appellant and was unknown to appellee, by means whereof the appellee was injured, as aforesaid, through the incompetency, recklessness and carelessness of said servant of appellant. The gist of the second count of the declaration is, that appellant, with notice,

negligently employed an incompetent servant to handle a ladle full of molten metal, by means whereof the appellant, by its said servant, carelessly caused the said metal to spill upon the ground and explode against the appellee.

* * * * *

It is next urged by appellant that the court erred in giving instruction No. 4. That instruction is as follows:

“It was the duty of the defendant to use reasonable care to learn and know whether its servants were competent and fit for their work, so that it would be reasonably safe for the defendant’s other servants to work with them without being exposed to unnecessary danger to life or limb by reasons of incompetency, if any; and if defendant’s servant known as ‘Scotty’ was incompetent for his work, and if by reason thereof other servants of defendant were exposed to unnecessary danger to life and limb, and if defendant by reasonable care would have known of such incompetency and danger, if any, before the alleged injury to plaintiff, in time by reasonable care to prevent such danger, then it was defendant’s duty to use reasonable care not to expose the plaintiff to the danger, if any, of working with such incompetent servant, if any.”

Appellant concedes that this instruction states a correct proposition of law as far as it goes, but contends that under the evidence in this case the instruction should have gone further and explained to the jury that if appellee had knowledge, or equal means of knowledge, with appellant of the incompetency of the servant “Scotty” and made no objection to working with him, appellee would assume the risk of injury that might result from such incompetency. This criticism cannot be sustained. The instruction under consideration does not purport to state all the facts upon which a right of recovery depends. It does not conclude with a direction to find a verdict for appellee, and does not, therefore, fall within a class of instructions often condemned by this court which conclude with a direction to find a verdict for a particular party without stating all the essential facts to support such conclusion. It is unnecessary, and often impracticable, to state the whole law of a case in one instruction. Efforts to do so are more likely to confuse than enlighten the jury. Besides, the liability to

commit error is minimized by stating the law applicable to a particular question or particular parts of the case in separate instructions. This court has often had occasion to announce the familiar rule that instructions are to be considered as a series, and, when so considered, if, as a whole, they state the law correctly that is sufficient. The jury were informed by other instructions in the series of the effect the facts omitted from this one would have upon the relative rights of the parties. Instruction No. 36 given on behalf of appellant advises the jury that appellee could not recover under the second count of his declaration unless he proved that he did not know, and by the exercise of reasonable diligence would not have known, that the servant "Scotty" was incompetent, careless and reckless. Appellant had the full benefit of the doctrine of the assumption of risk, so far as it applied, resulting from the incompetency and carelessness of the fellow servant of the appellee by instructions 18, 19, 20, 21, 22, 30, 33, 35, 36 and 38 given at its instance by the court.

* * * * *

There being no reversible error in this record the judgment of the Appellate Court for the First District is affirmed.

Judgment affirmed.

McDIVITT V. DES MOINES CITY RAILWAY COMPANY.

Supreme Court of Iowa. 1909.

141 Iowa, 689.

EVANS, J.—* * *

* * * * *

The appellant complains further that the instructions of the court were contradictory, and that, although the court held the deceased to have been guilty of contributory negligence, it nevertheless laid upon the plaintiff the burden of proving freedom from contributory negligence before she

could recover even upon the theory of the "last clear chance."

After a statement of the issues, the court presented its instructions in paragraphs numbered from 1 to 19, inclusive. The first six are as follows:

(1) The burden of proof is upon the plaintiff to establish by preponderance of the evidence each of the following propositions: First, that the deceased, Edith McDivitt Lawson, was struck and injured by the defendant's car about the time, at the place, and substantially in the manner alleged in plaintiff's petition; second, that said decedent was not guilty of negligence causing or contributing to her said injury; third, that the defendant was guilty of negligence substantially as alleged by plaintiff and hereafter in these instructions more fully specified; fourth, that said injuries so received by decedent were the direct and approximate result of the negligence of the defendant; fifth, that the estate of decedent has been damaged in some amount thereby. If you find affirmatively as to each and all of the above propositions, then your verdict will be for the plaintiff. If you fail to find affirmatively as to any one of the above propositions, your verdict will be for the defendant.

* * * * *

(4) The undisputed evidence in this case shows that the deceased approached the railway track of defendant, and, after having so approached the railway track of defendant, waited for the west-bound car to pass her, and that, after such car had passed, decedent immediately proceeded across the north track, and the intervening space of almost five feet between the north and south tracks, and stopped in front of an east-bound car on the south track, there passing, and was struck by said car without taking any precautions to avoid the accident. You are instructed as a matter of law that this action of decedent would constitute negligence, and plaintiff cannot recover unless you find as hereinafter instructed. The only question therefore which you have submitted to you for consideration is whether or not the defendant's employees in charge of the east-bound car, which came in contact with the deceased, were guilty of the negligence charged in failing to avoid the injury which resulted in the death of decedent

after the deceased stepped from behind the west-bound car and onto the south track of defendant, and she was seen by the motorman in a position of danger * * *

(6) You have been heretofore instructed, gentlemen, that the decedent was negligent in going upon the track in front of the east-bound car, which struck her; but you are further instructed that, while the law holds that plaintiff cannot recover on account of the contributory negligence of the decedent in stepping in front of the east-bound car in the manner in which she did, yet if, after the motorman saw her in a place of danger or about to step upon the track in front of the approaching car, he negligently failed to stop said car within a reasonable time or distance under the circumstances shown by the testimony, and such failure was the direct and proximate cause of the injury which resulted in the death of decedent, then your verdict will be for the plaintiff.

From an examination of instruction 1, it will be observed that the jury was instructed, expressly, that, if it failed to find that the decedent was not guilty of contributory negligence, the verdict must be for the defendant. Instructions 4 and 6 expressly stated to the jury that the decedent was guilty of contributory negligence. This presents the alleged contradiction of which appellant complains. It is contended by appellee that instructions 4 and 6 expressly state to the jury that the plaintiff may recover notwithstanding contributory negligence, and this contention is correct; but this does not eliminate the contradiction in the instructions. Appellee contends that the instructions must be considered as a whole, and this is true. It is argued also, that the error in the first instruction is cured by the statement in the fourth and sixth; but it is cured only in the form of a contradiction. Our previous cases cited by appellee are not in point. It has been held that where an instruction is ambiguous, or where standing alone, it is erroneous because of some omission, it may be cured by other instructions that are clear upon the omitted or ambiguous point; but where an instruction is free from ambiguity, and is affirmatively erroneous, the error is not cured by a contradiction contained in another instruction. There is no way in such case to determine which instruction the jury may follow. The question pre-

sented in this case is almost parallel with *Christy v. City Railway Company*, 126 Iowa, 428, and the cases therein cited. The error in this case was somewhat emphasized by the sixteenth instruction, which contains the following: "Contributory negligence is such negligence as contributes to an injury"—a definition which was quite unnecessary in view of the withdrawal of the question from the consideration of the jury. The natural effect of it would be to impress the jury that the question was still in the case, and to emphasize the error contained in instruction 1.

* * * * *

The judgment below is reversed, and cause remanded for a new trial.—*Reversed*.

SECTION 4. REQUESTS FOR INSTRUCTIONS.

CENTRAL RAILROAD V. HARRIS.

Supreme Court of Georgia. 1886.

76 Georgia, 501.

Lucinda Harris brought suit against the Central Railroad to recover damages for the killing of her husband. The testimony for the plaintiff tended to show that the husband was in the depot in the city of Atlanta; that he walked alongside the train to go beyond the engine, which projected from the depot into a street-crossing at its end; that he undertook to cross the track at the street-crossing, when the train started rapidly without giving any signal and ran over him.

* * * * *

The jury returned a verdict for the plaintiff for one thousand dollars. The defendant moved for a new trial upon the following grounds:

* * * * *

(2) Because the court failed entirely to put before the jury the main defense relied upon by the defendant, and to sustain which abundant evidence had been introduced,

to-wit, that defendant had boarded the passenger train in the depot without having purchased a ticket, and without having any intention of leaving the city thereon, but simply to say good-bye to a crowd of colored servants on their way to Florida, and that he had attempted to jump from said train when in motion, and from a platform having no steps attached thereto by which to descend to the ground, and having a railing extending around the entire platform to prevent persons from getting on and off the car to which it was attached, at that end. The charge of the court failed to call the attention of the jury in any way to these facts, but singled out the one element of negligence arising from the failure, if such failure existed, to toll the bell on crossing Pryor street.

* * * * *

JACKSON, Chief Justice.

The very able and distinguished counsel for defendant in error saw the force of this exception to the charge, and endeavored to meet it by the reply that the counsel for the plaintiff in error could not use the exception, because he did not call the attention of the court to the omission of which he now complains, and cited decisions of this court bearing upon the necessity of his doing so before he could take advantage of the omission.

We think, however, that the cases cited, and the principles on which they rest, do not apply to the clear omission to notice in the charge a plain defence of the company arising out of his evidence so as not to escape the observation of the judge, but to omissions to expand the charge, so as to make more clear the point on which he has charged substantially, but not as fully as would have been done had attention been called to it. The courts will not allow a party to lie in wait for the judge when he charges substantially the law covering the case, and then object to the insufficiency of a portion of it; but in every case, the law of it must be given in substance to the jury, because if it is not given, the general verdict they give is not upon the law, the law of the case, but on facts without instructions on the law of the case. The ship is at sea without chart or pilot, and can never reach the port to which it is bound without their guidance. The verdict can never be a legal verdict unless instructions on the law of the case

be given by him who presides for that purpose. The omission to cover the case substantially must always set it aside.

An so this court has often ruled. In the case of *Hardin, Executor vs. Almand*, 64th Ga. 582, the 8th head-note lays down the rule thus: "Where the case is fully covered by the general charge, the failure to instruct the jury on a particular branch of it is not error in the absence of a request." The case at bar is not fully covered, in that it ignores one defence, and makes an act of negligence in the company affect that defence, if meant to be alluded to at all, which act could not have possibly affected it.

* * * * *

So from an early date this court has uniformly held that the law of the case must be given to the jury to the extent of covering the substantial issues made by the evidence, whether requested or not, or attention be called to it or not; otherwise the verdict will be set aside.

* * * * *

In all these cases, it is believed, from an examination of each, the principle is clearly deducible that without any request of counsel or reminder of the court by counsel, the instructions of the court must substantially embrace the rule of law on the issues between the parties which the evidence makes. If that be done substantially, then there is a line of decisions cited by counsel for the defendant in error, to the effect that if the charge be not full enough or clear enough or omits something that would put one side or the other more fairly before the jury than the charge given does, then the notice of the court must be called thereto, or the party complaining will not be heard here. If there be any exception to this general rule in this court from 11th Ga. down to 69th, it is very scarce, and will be found approximating closely to the rule laid down, if not clearly within it.

* * * * *

The judgment is reversed solely because the court in the charge ignored the defence set up by the defendant below, that plaintiff's husband's own negligence—his own rash act—in jumping from the cars killed him, without any negligence at all of the defendant which contributed

to that act of his,—the only negligence proved being the neglect to ring the bell, which did not affect in the least the disastrous result of the rashness of the deceased.

*Judgment reversed.*¹

¹ *Accord:* Owen v. Owen (1867) 22 Iowa, 270; Capital City Brick & Pipe Co. v. Des Moines (1907) 136 Iowa, 243, 113 N. W. 835; York Park Bldg. Ass'n v. Barnes (1894) 39 Neb. 834, 58 N. W. 440.

MORGAN V. MULHALL.

Supreme Court of Missouri. 1908.

214 Missouri, 451.

LAMM, J.—Suing Mulhall, Ernest Morgan by his next friend asked \$20,000 damages, grounding his right of action on a negligent shooting and wounding. At a trial with the aid of a jury, he got a verdict of \$5,000. From a judgment entered, defendant appeals.

The petition follows:

“The plaintiff for his cause of action sheweth to the court that on the 24th day of May, 1905, upon the petition of said Ernest Morgan the said circuit court did appoint Joseph Morgan as his next friend to commence and prosecute this suit, and said Joseph Morgan has consented in writing to act as such next best friend for said purpose.

“And the plaintiff further sheweth to the court that on the 18th day of June, 1904, in said city of St. Louis and on the grounds of the Louisiana Purchase Exposition Company, the defendant by shooting into a crowd of people negligently shot the plaintiff, Ernest Morgan, with a pistol * * *

* * * * *

Defendant stood mute and neither prayed nor got any instructions whatever. Plaintiff asked none on the trial issue of negligence nor on issues relating to the defence. He asked and got two—one on the measure of damages, the other a rule of law relating to the credibility of the witnesses and the weight of their testimony. In this state of the record, defendant does not contend the instructions

given were bad law in and of themselves, but his counsel insist it was error to not give instructions bearing upon the issues and announcing rules of law by which the jury could be guided to a just verdict on them.

* * * * *

(b) An excellent law writer states the general doctrine in civil cases to be: "It is then, a general rule of procedure, subject, in this country, to a few statutory innovations, that mere *non-direction*, *partial* or *total*, is not ground of new trial, unless specific instructions, good in point of law and appropriate to the evidence, were requested and refused. A party cannot, by merely excepting to a charge, make it the foundation for an assignment of error, that it is indefinite or incomplete." (2 Thompson on Trials, sec. 2341). Judge Thompson supports his text by a wealth of authorities in a note, adding: "The English rule seems to be that non-direction, where specific direction is not requested, is no ground of a new trial, unless it produce a verdict against the evidence." (Citing *Ford v. Lacey*, 30 L. J. (Exch.) 351; *Railroad v. Braid*, 1 Moore, P. C. Cas. (N. S.) 101.)

To question that general rule in Missouri at this late day would be to spin cobwebs before the eyes of justice and mischievously unsettle the law. This is so because our statute on procedure in civil cases does not contemplate instructions whether or no. Parties litigant have their option to ask or not ask for them. That statute ordains (R. S. 1899, sec. 748): "When the evidence is concluded, and before the case is argued or submitted to the jury or to the court sitting as a jury, either party *may* move the court to give instructions on any point of law arising in the cause, which shall be in writing and shall be given or refused. The court *may* of its own motion give like instructions, and such instructions as shall be given by the court on its own motion or the motion of counsel shall be carried by the jury to their room for their guidance to a correct verdict according to the law and evidence; which instructions shall be returned by the jury into court at the conclusion of the deliberations of such jury, and filed by the clerk and kept as a part of the record in such case."

In construing that section, the better view is that it is permissive, not mandatory. Doubtless it conduces to the

science of jurisprudence and the orderly administration of the law to have instructions defining the issues, putting it to the jury to find the fact and declaring the law on the fact when found, but it is within the knowledge of the profession (and our decisions show) that cases are not infrequently tried, *nisi*, without them. That mere non-direction is not misdirection is a familiar, settled rule of appellate procedure. Under that rule, before appellant can predicate reversible error on what a trial court does not say to the jury, he must first put the court in the wrong by asking it to say something, or else the court in trying to cover the case by instructions holds a false voice, or omits in general instructions essential elements of the case. (*Tetherow v. Railroad*, 98 Mo. 74; *Coleman v. Drane*, 116 Mo. l. c. 394; *Browning v. Railroad*, 124 Mo. 55; *Nolan v. Johns*, 126 Mo. 159; *Wilson v. Railroad*, 122 Mo. App. l. c. 672, *et seq.*, and cases cited; *Nugent v. Armour Packing Co.*, 208 Mo. l. c. 500; *Flaherty v. Railroad*, 207 Mo. l. c. 339.)

Here, manifestly, appellant was as much to blame as the court or respondent for the omission to instruct on vital issues; for he by his silence joined in the general silence and made it more profound. At most it was common error, if any, and error common to all is not reversible error. He who does not speak when he should, will not be heard to speak when he would.

The premises considered, we have nothing to do but look to the record and see if it supports the verdict. We find ample testimony to support it.

Accordingly, the judgment is affirmed. It is so ordered. All concur.¹

¹ *Accord*: *Stuckey v. Fritzsche* (1890) 77 Wis. 329, 46 N. W. 59; *Osgood v. Skinner* (1904) 211 Ill. 229, 71 N. E. 869; *Palatine Ins. Co. v. Santa Fe Mercantile Co.* (1905) 13 N. Mex. 241, 82 Pac. 363; *Womack v. Circle* (1877) 29 Gratt (Va.) 192; *Texas & Pacific Ry. Co. v. Volk* (1894) 151 U. S. 73.

CHICAGO CITY RAILWAY COMPANY V. SANDUSKY.

*Supreme Court of Illinois. 1902.**198 Illinois, 400.*

MR. JUSTICE BOGGS delivered the opinion of the court:

Between eight and nine o'clock in the evening of April 18, 1898, a cable car which the appellant company was operating northwardly along its tracks in State street, in the city of Chicago, collided with a junk wagon in which the appellee was riding and threw him from his seat to the surface of the paved street, and thereby inflicted injuries upon his person for which he was awarded judgment in the sum of \$1,000 in an action on the case which he instituted against the company in the superior court of Cook county. On appeal perfected by the company to the Appellate Court for the First District the judgment was affirmed, and the cause is before us on a further appeal in the same behalf.

* * * * *

After the plaintiff had rested his case, and while the defendant was adducing its evidence, the court called the attorneys for the parties and read to them the following order which the court had drawn and entered in the case: "It is ordered at this time, while the witnesses on the part of the defendant are being examined, that the instructions to be tendered to, examined or given by the court to the jury be limited to twenty-four,—twelve on the part of the plaintiff and twelve on the part of the defendant,—and that no instruction in excess of said numbers will be received or examined by the court or given to the jury." The defendant excepted to the order, and, afterwards, to the decision of the court in refusing to give or examine twenty instructions presented in a body, in addition to the twelve handed up under the order of the court. The appellant company, in recognition of the rule but under protest, presented twelve instructions to be given or refused by the court under the rule, and also presented twenty additional instructions. The court declined to examine or pass upon any of the twenty additional instructions, for the reason they were each in excess of the number of twelve limited by the rule. Counsel

for appellant preserved exceptions to this ruling of the court.

So far as we are advised, the power of a trial court to limit requests for instructions to an arbitrary number from each litigant has never received the consideration of a court of review. The power of the judge to prescribe a reasonable rule regulating the presentation of instructions to be given or refused is everywhere conceded. Rules that instructions will not be considered if presented after the beginning of the argument to the jury, or during the course of the argument to the jury, or during the course of the general charge, or after the judge has concluded his general charge, or after the cause has gone to the jury, or after the jury had come in and disagreed, have been sustained. (11 Ency. of Pl. & Pr. 240; *Prindiville v. People*, 42 Ill. 217.) In *Prindiville v. People*, *supra*, the rule had been adopted by the trial court requiring that the instructions should be presented before the commencement of the argument of the cause. The appellant presented additional instructions while the attorney for the People was making his closing argument to the jury, and they were refused under the rule. The instructions were not embodied in the bill of exceptions, and we held we could not know but that the court ought to have refused them independently of the rule, and therefore did not determine whether the rule under consideration was reasonable. We there indulged in the following observations, (p. 222) which meet our approval, viz.: "The dispatch of business, the rights of litigants, jurors and witnesses, all require that the time of the court shall not be unnecessarily consumed in the trial of causes, and to avoid such consequences courts must be invested with power to adopt all reasonable rules for the practice of their courts. Ever since the adoption of the statute requiring all instructions to be reduced to writing before they are given, it is believed that similar rules have been in force in all of the circuit courts in the State. They have varied slightly in their requirements, but all are designed to attain the same end. The rule which is believed to have most generally obtained requires all instructions to be furnished the court by the commencement of the closing argument. That, it seems to us, is well calculated to meet the convenience of both parties and the court and to economize time, and can in no

way hinder or prevent the attainment of a fair trial by both parties. So far as our observation has extended such a rule has operated well. It gives ample time after the close of the evidence and the case fully opened to the jury for both parties to prepare their instructions, and the court, being thus apprised of the legal propositions they have assumed, has, after the instructions are thus presented, usually ample time for their examination and to determine upon their correctness. It is essential that the court shall exercise such power, through reasonable and proper rules, as shall enable him to dispatch business at least so fast as the proper administration of justice may require."

We do not wish, however, to be understood to hold that another mode or manner of regulating the presentation of instructions than that referred to may not be adopted. We are inclined, however, to regard as unreasonable a hard and fast rule that instructions shall be limited to a given number. It is the prolixity and confusing character of the charge, as a whole, that rules of this character are designed to obviate. Restriction in point of number, only, of the instructions will not remove the evil. A number of concise, clear instructions, each of which is confined to a distinct branch or phase of the contention or distinct proposition of law, is preferable to one long, diffuse and complicated instruction, which includes within its range all or several of the propositions or phases of the case and attempts to advise the jury as to different and independent legal propositions. A general charge, consisting of instructions of the latter character, though not exceeding the number permitted by the rule, would be more objectionable, from every proper point of view, than a charge composed of instructions which, though short and clear and of a character to enlighten the jury, exceeded the number allowed by the rule. It is unreasonable to assume that each of the parties needs the same number of instructions. The issues in behalf of one may make a number of instructions necessary while the jury need little information as to those for the other party. The judge could not, by a general rule applicable to all cases or classes of cases or causes of action, determine and specify, in advance of the hearing, the number of instructions proper and requisite to be used in all cases. If the court should wait until the conclusion of the evidence

in the cause and then determine the number of instructions he would consider, the rule would be unreasonable in its operation upon counsel, in that it would interfere with or prohibit the practice, adopted by many careful and competent lawyers, of preparing their instructions in advance of the trial. The court may refuse instructions which are but repetitions of others of the series which he has given, and thus the number of instructions may be restricted to the propositions of law really involved; and any rule which would authorize the refusal of an instruction otherwise proper to be given, on the ground, alone, that as many instructions as the rule allowed had been given, could not be defended.

But the cause will not be reversed because of the error of the court in adopting the rule. The bill of exceptions contains the instructions which the court refused to examine. Counsel for appellant, in their brief, point out but one instruction among the twenty which the court refused to consider, which, in the view of counsel, was necessary to advise the jury as to any principle of law important to the defense to the action. The substance of this instruction was, that in arriving at a conclusion as to the truth of the statements made by any witness the jury might consider the improbable character of such statements. The fifth instruction given in behalf of the plaintiff below correctly stated the proposition of law referred to in the instruction which was not passed upon. It was not necessary it should have been repeated. As it is not complained that any other of the instructions which were refused under the rule were necessary to the proper presentation of the defense, the judgment should not be reversed for the error in adopting the rule.

The judgment is affirmed.

*Judgment affirmed.*¹

¹ In *Sidway v. Missouri Land & Live Stock Co.* (1901) 163 Mo. 342, 376, the court said: "Next for consideration are the instructions, respecting which we say that *nine and one-half* printed pages of instructions is too much for an average jury to digest and understand. The only effect of such a multiplicity of instructions would be not to *instruct* the jury but to *confuse* and *mislead* them; make their verdict mere *guesswork*. The changes rung on all the phases of this case, and some not of this case, by this vast array of instructions, reminds one of what Judge Scott used to say was 'like the multiplication table set to music.' We have remonstrated with the trial courts for years about the great impropriety and frequent injustice resulting from writing or giving instructions *by the acre*, but without avail, and so resort

must be had to more drastic measures. We therefore hold that the great number of instructions given in this instance, *of itself*, warrants a reversal of the judgment."

CHESAPEAKE & OHIO RAILWAY COMPANY V.
STOCK.

Supreme Court of Appeals of Virginia. 1905.

104 Virginia, 97.

KEITH, P., delivered the opinion of the court.

* * * * *

The eleventh assignment of error is a novel one. After the jury had been instructed, plaintiff in error presented the following request to the court:

"The defendant prays the court that should the hypothesis of the facts whereon the several instructions propounded by it be incorrect, or should the said instructions be inartificially or incorrectly expressed, or should the conclusion of law therein announced be incorrectly stated, that the court will so amend the same as to accord with the facts and law of this case, to the end that the jury may be duly instructed on the phases of the case at bar presented by the said instructions."

Which the court refused. * * *

This court has held in numerous cases that a trial court is bound to give any instruction asked for by either party which correctly expounds the law upon the evidence before the jury. "But if such instruction does not correctly expound the law, the court, as a general rule, may refuse to give it, and is not bound to modify it or give any other instruction in its place. This principle is founded on good reasons, and is sustained by much authority. A party cannot, by asking for an erroneous instruction, devolve upon the court the duty of charging the jury on the law of the case. An instruction, as asked for, may be so equivocal, that to give or refuse it might mislead the jury, and thus it might have all the effect of an erroneous instruction. In such a case, it would be proper for the court to modify the instruction so as to make it plain." *Rosenbaums v.*

Weeden, etc., 18 Gratt. 799, 98 Am. Dec. 737; *B. & O. R. Co. v. Polly, Woods & Co.*, 14 Gratt. 448; *Peshine v. Shepper-son*, 17 Gratt. 472, 94 Am. Dec. 468.

It cannot be doubted that, if the instruction correctly states the law, and there be sufficient evidence to support the verdict, it should be given. It is equally plain that if it does not correctly state the law, it should not be given. The sole question is as to the duty of the court to amend an instruction offered by counsel. The rule as stated in *Rosenbaums v. Weeden, supra*, and approved in numerous decisions of this court, is that when an instruction offered is equivocal, so that either to give or refuse it might mislead the jury, the duty is imposed upon the court so to modify it as to make it plain; that if it be right, it should be given; if it be wrong, it should be rejected; if it be equivocal, it should be amended. By what test is a court to measure the duty thus imposed, and how is a jury to be misled by an instruction which the court declines to give? An equivocal instruction of course should not be given, because an equivocal instruction is an inaccurate expression of the law, and for that reason should be refused. To say that a jury may be misled by a refusal to give an instruction, and therefore the instruction should be amended and given, is to prescribe a rule so vague and indefinite as to embarrass rather than to assist trial courts in the performance of their duty. It is the duty of juries to respect the instructions given them. It is not to be supposed that they have any knowledge with respect to those which the court refuses to give; and finally, if it be conceded that the offer of instructions, their discussion, and the judgment of the court upon them, take place in the presence of the jurors, it is an impeachment of their integrity, or of their intelligence, to assume that they were influenced or misled by what has occurred.

But however this may be, we know of no authority, in this court or elsewhere, which imposes upon trial courts the burden sought to be placed upon them by the "prayer" under consideration.

The rule which prevails in other jurisdictions is thus stated Blashfield on Instruction to Juries, sec. 137, and is supported by the great weight of authority: "In order to entitle a party to insist that a requested instruction be giv-

en to the jury, such instruction must be correct both in form and substance, and such that the court might give to the jury without modification or omission. If the instruction, as requested, is objectionable in any respect, its refusal is not error. A party cannot complain that the court did not, of its own motion, modify and correct the request and then give it as corrected. No such duty rests upon the court."

* * * * *

Reversed.

SECTION 5. CAUTIONARY INSTRUCTIONS.

(a) *Admissions.*

SCURLOCK V. CITY OF BOONE.

Supreme Court of Iowa. 1909.

142 Iowa, 580.

EVANS, C. J.—The plaintiff was a resident of the defendant city. On February 26, 1907, she claims to have fallen upon one of the sidewalks by reason of a loose board thereon. The claim is that her grandson, who was walking at her side, stepped upon one end of the board, whereby the other end was thrown up against the plaintiff in such a way as to cause her to fall. It is claimed that she suffered internal injuries either by the fall or by the blow from the board. It was claimed at the time of trial that she was then in a poor state of health, and one of the issues of fact in dispute was whether her then condition was caused by the accident complained of.

* * * * *

II. It appeared from the testimony on behalf of the plaintiff that prior to the accident she had always maintained good health. On behalf of the defendant, Mrs. Miller and Mrs. Ball, her daughter, both testified that on one occasion, about two years previous, the plaintiff called at their home at Ames, and that she stated to them at that time that she was in very poor health. T. L. Jones, one of the city council, testified also that prior to the accident the

plaintiff had frequently told him that she was not well. None of this testimony was denied by the plaintiff, either directly or indirectly; nor did she refer to it in any way in her rebuttal testimony. The court gave to the jury the following instruction. “(12½) There is some evidence in this case with respect to an admission by the plaintiff in regard to the condition of her health at a time prior to the accident. Verbal admissions, consisting of mere representations of oral statements, made a long time before, are subject to much imperfection and mistakes, for the reason that the person making them may not have expressed her own meaning, or the witness may not have understood her, or, by not giving her exact language, may have changed the meaning of what was actually said, and this is especially true where a long time has elapsed since the alleged admission was made. Such evidence should therefore be received by you with caution.” This instruction is earnestly challenged by the appellant. We are constrained to hold that it can not be sustained. This court has heretofore approved the rule on this point as laid down by Greenleaf. 1 Greenleaf, section 200; *Martin v. Town of Algona*, 40 Iowa, 392; *Allen v. Kirk*, 81 Iowa, 670.

It will be observed that the instruction under consideration, through probable oversight, falls short of stating the Greenleaf rule. As set forth in the *Martin* case, *supra*, the following should have been added: “But when such admissions are deliberately made or often repeated, and are correctly given, they are often the most satisfactory evidence, and the jury should consider all the circumstances under which they were made and give them such weight as they are justly entitled to receive.” This latter proviso gives a proper balance to the rule. An instruction substantially in the form of the one under consideration was condemned by this court in *Hawes v. B., C. R. & N. Ry. Co.*, 64 Iowa, 315. See, also, *Castner v. Railway Co.*, 126 Iowa, 586. The natural effect of the court’s instruction as given was to minimize unduly the testimony of the defendant on the subject referred to, and this is especially so in view of the fact that the plaintiff neither denied the statements attributed to her, nor denied recollection of them, nor offered any explanation.

The tendency of this instruction to minimize the evidence

referred to was further emphasized by the use of the word "some" in the first sentence. This court has heretofore condemned the use of this word in this connection, in that its tendency is to belittle the evidence referred to. *State v. Donovan*, 61 Iowa, 369; *State v. Dorland*, 103 Iowa, 174; *State v. Rutledge*, 135 Iowa, 581. We feel constrained therefore to hold that defendant's exception to this instruction must be sustained.

* * * * *

For the error pointed out in instruction 12½ the judgment below must be reversed.¹

¹ *Accord*: *Allen v. Kirk* (1891) 81 Iowa, 658, 47 N. W. 906; *Stewart v. De Loach* (1890) 86 Ga. 729, 12 S. E. 1067; *Tozer v. Hershey* (1870) 15 Minn. 257; *Haven v. Markstrum* (1886) 67 Wis. 493, 30 N. W. 720.

KAUFFMAN V. MAIER.

Supreme Court of California. 1892.

94 California, 269.

HARRISON, J.—The plaintiff brought this action against the defendants to recover damages for personal injuries alleged to have resulted from their negligence. He was in their employ at the time of the injury, and the negligence charged upon them was their permitting the shaft of a wheel to protrude into the room where he was at work, by reason of which his sleeve was caught upon the jagged end of the shaft, causing him to be carried around it, whereby his arm was so injured as to require amputation. The plaintiff recovered judgment in the court below, and a new trial was granted upon the motion of the defendants, and from this order the plaintiff has appealed. In their statement upon the motion for a new trial, the defendants have assigned various errors of law on the part of the court, as well as many particulars in which the evidence is claimed to be insufficient.

* * * * *

5. Evidence was given at the trial tending to show that shortly after the injury the plaintiff had made statements

to the effect had it was the result of his own fault, and that the accident had been brought about by a different cause from that shown at the present trial. In its instructions to the jury, the court said: "The court instructs the jury that although parol proof of the verbal admissions of a party to a suit, when it appears that the admissions were understandingly and deliberately made, often afford satisfactory evidence, yet, as a general rule, the statements of the witnesses as to the verbal admissions of a party should be reviewed by the jury with great caution, as that kind of evidence is subject to much imperfection and mistake. The party himself may have been misinformed, or may not have clearly expressed his meaning or the witness may have misunderstood him; and it frequently happens that the witness, by unintentionally altering a few expressions really used, gives an effect to the statement completely at variance with what the party did actually say. But it is the province of the jury to weigh such evidence, and give it the consideration to which it is entitled, in view of all the other evidence in the case."

In thus instructing the jury, the court disregarded the provision of the constitution that "judges shall not charge juries with respect to matters of fact, but may state the testimony and declare the law."

While it is a matter of common knowledge that the statements of a witness as to the verbal admissions of another are liable to be erroneous, and for that reason should be received with caution, yet such conclusion is only an inference of fact which must be made by the jury, and is not a presumption or a conclusion of law to be declared by the court. The reasons which are to be urged in favor of receiving such statements with caution are based upon human experience, and vary in strength and conclusiveness with the facts and circumstances of each case, and their sufficiency in any particular case is an inference which the reason of the jury makes from those facts and circumstances; but there is no rule of law which directs the jury to invariably make such an inference from the mere fact that the proof of the admission is by oral testimony. That deduction called a presumption which the law expressly directs to be made from particular facts is uniform, and not dependent upon the varying conditions and circum-

stances of individual cases. To weigh the evidence and find the facts in any case is the province of the jury, and that province is invaded by the court whenever it instructs them that any particular evidence which has been laid before them is or is not entitled to receive weight or consideration from them. (*People v. Walden*, 51 Cal. 588; *People v. Fong Ching*, 78 Cal. 173; *Mauro v. Platt*, 62 Ill. 450; *Commonwealth v. Galligan*, 113 Mass. 202; *McNeil v. Barney*, 51 Cal. 603; *People v. Dick*, 34 Cal. 666.)

The instruction above quoted is, in substance, an argument to the jury with "respect to matters of fact" that had been presented at the trial, and a comment by the court upon the weight which they should give to that testimony. Whether the facts and circumstances proved in the case were sufficient to cause the reason of the jury to make this inference was fair matter of argument for the counsel of the respective parties; but the court forsook its judicial position when it assumed the office of commenting upon the weight and credibility of this evidence. The closing paragraph in the instruction, to the effect that it was for the jury to give to the evidence the consideration to which it was entitled, did not obviate the error, as by its remarks the court had, in substance, said to them that as matter of law the evidence was not entitled to any great consideration.

The order is affirmed.

SHARPSTEIN, J., GAROUTTE, J., and McFARLAND, J., concurred.¹

¹ *Accord*: *Knowles v. Nixon* (1896) 17 Mont. 473, 43 Pac. 628; *Johnson v. Stone* (1892) 69 Miss. 826, 13 So. 850.

(b) *Burden of Proof.*

CRABTREE V. REED.

*Supreme Court of Illinois. 1869.**50 Illinois, 206.*

MR. CHIEF JUSTICE BREESE delivered the opinion of the court:

The only question between the parties to this record was, as to the value of a mule the appellee acknowledged he had struck with a heavy stick, and which belonged to the appellant, causing its death.

The action was case, for killing the mule, and the court, on behalf of defendant, instructed the jury that the burden of proof rested upon the plaintiff, and that he was bound to maintain, by a clear preponderance of evidence, the allegations in the declaration, and that unless they find such a preponderance, they will find for the defendant. Though the defendant had admitted he struck the mule in disciplining him, he not having been broke to work, and that from the blow the mule died, he contested the fact of killing before the jury, and under the above instruction, the jury found for him.

This instruction must certainly have misled the jury. The law is not, in such a case, that there shall be a clear preponderance of evidence in favor of the plaintiff to entitle him to recover. It is sufficient, if the evidence creates probabilities in his favor—that the weight of the evidence inclines to his side.

For this error the judgment must be reversed and the cause remanded.

Judgment reversed.

ALTSCHULER V. COBURN.

*Supreme Court of Nebraska. 1894.**38 Nebraska, 881.*

Post, J.

This was an action of replevin in the district court of Douglas county in which the plaintiff in error, Marguerite Altschuler, sought to recover certain personal property. * * * *

* * * * *

6. Exception was taken to the following instruction: "The burden of proof in this case is on the plaintiff to show by a preponderance of the testimony her right to the possession of the property in controversy at the commencement of this suit, and unless she has satisfied you by a fair preponderance of the testimony of her right to such possession, she cannot recover in this action." The criticism of the instruction is directed to the expression "fair preponderance" of the evidence used therein. In support of this exception we are referred by counsel to *Search v. Miller*, 9 Neb. 26, and *Marx v. Kilpatrick*, 25 Neb. 118, in which the expression "clear preponderance of the evidence" is condemned. But in *Dunbar v. Briggs*, 18 Neb. 94, an instruction was approved which required a counter-claim to be established by a fair preponderance of the evidence. The last case is in point and decisive of the question presented by this exception. In the opinion of the writer, any attempt to qualify that term by subtle distinctions between a clear preponderance and a fair preponderance of the evidence is to be deprecated as an unnecessary refinement and tending to confuse rather than enlighten the average mind. "Preponderance" is defined by Webster thus: "An outweighing; superiority of weight." There can be no preponderance while the evidence is evenly balanced, but when the scale inclines toward one side, we know the weight or superiority of evidence is with that party. Manifestly there can be no such outweighing unless there is both a clear preponderance and a fair preponderance. As well might we attempt to apply degrees of comparison to the

term "equilibrium" by holding the evidence in one case more evenly balanced than in another. Applicable in this connection is the language used in Stephen's General View of the Criminal Law, p. 262, with reference to the term "reasonable doubt," where it is said that an attempt to give a specific meaning to the word "reasonable" is "trying to count what is not number, and measure what is not space."

* * * * *

We find no prejudicial error in the record and the judgment is accordingly

Affirmed.

(c) *Positive and Negative Testimony.*

IN RE ESTATE OF WHARTON.

Supreme Court of Iowa. 1907.

132 Iowa, 714.

This is a proceeding for the probate of the will of Stephen Wharton, deceased, offered for probate by A. M. Harrah, devisee, who is also named as executor, to act without bond, and contested by George Wharton, his son, and Esther Wharton, his widow, who, having been adjudged insane, is represented by a guardian. The grounds of contest were want of mental capacity, and undue influence. There was a special finding of want of mental capacity by the jury, a general verdict in favor of contestants, and a judgment entered on such verdict, denying and refusing admission of the will to probate. Proponent appeals.

Affirmed.

MCCLAIN, C. J.—Many errors are assigned as to the action of the trial court, and it will only be possible to discuss those which seem to this court to be of controlling importance.

* * * * *

VI. Another instruction is complained of which directed the jury that, other things being equal, affirmative testi-

mony is in general entitled to more weight than negative testimony, and that, if a witness testifies that he did see certain things, and another witness of equal credibility testifies that he did not see such things, then if everything else is equal and such witnesses on either side are of equal credibility, the witness testifying negatively is entitled to less credit than the one testifying affirmatively. It is said that this rule, which certainly has some support in our decisions, has been discredited in *Stanley v. Cedar Rapids & Marion City R. Co.*, 119 Iowa, 526, 533, and *Selensky v. Chicago G. W. R. Co.*, 120 Iowa, 113, 116. But in each of these cases the instruction asked to this general effect was held properly refused, because witnesses who gave the so-called negative evidence, or some of them, were in as good a position to hear the sounds and signals referred to in the testimony of the witnesses giving the affirmative evidence as the latter were. But the instruction given in this case is not open to any such objection, and, under the evidence to which the instruction could have been understood by the jury as having reference, there was no error in giving it.

* * * * *

The judgment of the trial court is *affirmed*.

¹ *Accord*: Louisville, New Albany & Chicago Ry. Co. v. Shires (1884) 108 Ill. 617; Jones v. Casler (1894) 139 Ind. 382, 38 N. E. 812.

MCLEAN V. ERIE RAILROAD COMPANY.

Supreme Court of New Jersey. 1903.

69 New Jersey Law, 57.

The opinion of the court was delivered by

FORT, J.—This was an action for damages alleged to have resulted from an injury caused by the train of the defendant company running into a wagon of the plaintiff, in which the plaintiff was, at the crossing of the said company, at or near Soho, in Essex county.

* * * * *

Another alleged error was on account of the refusal of the trial judge to charge the following request: "That

affirmative evidence of the ringing of the bell and blowing of the whistle is generally entitled to more weight than evidence that it was not noticed or heard." We are unable to see upon what principle a judge is justified in stating to a jury that one piece of evidence, which is legitimate, is not to be treated by the jury the same as other evidence in the cause. It is for the jury to say whether the testimony of a witness having an equal opportunity to hear and whose hearing is equally good, and who testifies that he did not hear the blowing of a whistle or the ringing of a bell, notwithstanding he listened, shall or shall not be given equal credit with the testimony of a witness, similarly situated, who testifies that he did hear.

There was no error in the refusal of the trial judge to charge the request excepted to.

The judgment of the Circuit Court is *affirmed*.¹

¹ *Accord*: Atlantic Coast Line R. R. Co. v. O'Neill (1906) 127 Ga. 685, 56 S. E. 986; St. Louis & San Francisco R. R. Co. v. Brock (1904) 69 Kan. 448, 77 Pac. 86.

(d) *Credibility of Witnesses.*

CLINE V. LINDSEY.

Supreme Court of Indiana. 1886.

110 Indiana, 337.

ZOLLARS, J.—Lewis J. Cline died on the 26th day of January, 1884. By his last will, executed on the 22d day of that month, he bequeathed all of his property to appellants, children of a brother.

Appellees brought this action to set aside that will on the ground that at the time it was executed, the testator was a person of unsound mind, and hence incapable of making a valid will. With the will out of the way, appellees and the father of appellants are entitled to the property left by Lewis J. Cline, as his heirs at law, being his brothers, sister, and the descendants of deceased sisters.

Upon a verdict of the jury in favor of appellees, the court below, over appellants' motion for a new trial, set

aside the will. Appellants ask for a reversal of the judgment upon the alleged error of the court in charging the jury.

Our attention is first called to the twentieth instruction given by the court. It is as follows:

“20th. In weighing the testimony of witnesses, the jury should consider their capacity to understand the facts about which they testify, their opportunity of knowing the mental condition of the testator. The testimony of the testator’s neighbors, who have long been acquainted with him, and have had frequent intercourse with him, and whose attention has been particularly called to the testator, who have had frequent opportunities of observing his mind, is entitled to greater weight than that of a witness of equal sagacity, whose opportunities were more limited. The facts upon which the witnesses’ opinions are based have been given you, and of these you are the judges, weighing the facts as they have been given, in order to determine the condition of the testator’s mind. You are to weigh each particular incident and fact stated to you by the witnesses, and to determine from the whole whether or not the testator, at the time of the execution of the will, was or was not of sound mind. You are to take into consideration the will itself and its provisions, its unjustness or hardships, if any exist, to determine the soundness or unsoundness of the testator’s mind.”

The objection urged to the instruction by appellants’ counsel is, that the court thereby invaded the province of the jury by charging, as a matter of law, that the testimony of the testator’s neighbors, who had long been acquainted with him, etc., was entitled to more weight than the testimony of other witnesses of equal sagacity, whose opportunities had been more limited.

Considered without reference to any other charge that may have been given, the above instruction, in our judgment, is open to the objection urged against it.

It may be true, as a matter of fact, that the testimony of the neighbors of the testator, who had the advantages and opportunities named, was entitled to more weight than the testimony of other witnesses of equal sagacity, who had had less opportunities because of less acquaintance with the testator. But that was a fact to be determined by the jury

as a fact, and not by the court as a question of law.

The instruction, it will be observed, leaves out of view the essential element of credibility. The neighbors of the testator may have had greater opportunities and may have been of equal sagacity with other witnesses having had less opportunities, and yet be less worthy of credence.

Nor does it follow necessarily, and as a matter of law, that the testimony of one of two witnesses, of equal sagacity, is entitled to greater weight simply because he may have had more acquaintance with, and more frequent opportunities to observe, the person whose sanity is in question. The witness who has had less acquaintance, and less opportunities, may yet be the most reliable witness, because of some special training, experience, or habit of closely observing persons whom he meets. In all such cases it is for the jury to determine for themselves to what witness they will give the most credence. They have a right to consider the fact that some of the witnesses may have had greater opportunities than others. The court may instruct them that they have such right, but it ought not to invade their province, and undertake to determine for them what witness is the most reliable.

The latter portion of the instruction, in which the jury were charged that they should weigh the facts given by the witnesses as the facts upon which they based their opinions, does not relieve the instruction from the objection urged by appellants' counsel. In the first place, the charge directing the jury that the testimony of the one class of witnesses was entitled to the greater weight is general, and embraces all that those witnesses testified to; and, in the second place, it was impossible for the non-expert witnesses, giving their opinions as to the insanity of the testator, to state to the jury everything upon which those opinions were based. If they could have stated everything upon which they based their opinions, the opinions would have been incompetent. The rule which allows such opinions, is a rule of necessity, and rests upon the proposition that there may be something about the looks, deportment, etc., of a person which may contribute to the conclusion that he is of unsound mind, which can not be described in words by the witness. *Carthage T. P. Co. v. Andrews*, 102 Ind. 138 (52 Am. R. 653).

That the instruction was erroneous, because the court thereby invaded the province of the jury, by directing them that the testimony of one class of witnesses was entitled to more weight than the testimony of another class, is well settled by our cases. *Fulwider v. Ingels*, 87 Ind. 414, and cases there cited; *Voss v. Prier*, 71 Ind. 129; *Dodd v. Moore*, 91 Ind. 522, and cases there cited; *Works v. Stevens*, 76 Ind. 181; *Woolen v. Whitacre*, 91 Ind. 502, and cases there cited; *Nelson v. Vorce*, 55 Ind. 455; *Goodwin v. State*, 96 Ind. 550 (569), and cases there cited; *Unruh v. State, ex rel.*, 105 Ind. 117, and cases there cited; *Morris v. State, ex rel.*, 101 Ind. 560, and cases there cited; *Bird v. State*, 107 Ind. 154, and cases there cited; *Vanvalkenberg v. Vanvalkenberg*, 90 Ind. 433.

A part of one of the instructions approved in the case of *Rush v. Megee*, 36 Ind. 69 (84), is similar to the instruction here condemned, but the probability is that in that case the attention of the court was not called to the objections urged here.

The instruction as given is erroneous, but it does not follow that because of the error of the court in giving it, the judgment must be reversed.

* * * * *

It appears here that an erroneous instruction was given, but it is not shown by the record that the giving of it was prejudicial to appellants. The evidence is not in the record, nor is there anything in the record showing, or tending to show, that the witnesses spoken of in the charge as the neighbors of the testator, were witnesses below in behalf of appellees. For aught that is shown by the record, they may have been called by appellants, and may have testified in their behalf, that the testator was a person of sound mind, and hence capable of making the will.

* * * * *

Upon the whole case, we think that the judgment ought to be affirmed.

Judgment affirmed, with costs.

GUSTAFSON V. SEATTLE TRACTION COMPANY.

Supreme Court of Washington. 1902.

28 Washington, 227.

REAVIS, C. J.—Action for damages for personal injuries.
* * * The court, on the submission of the cause, gave the following instruction:

“There has been some expert testimony given in this case. The court instructs you that all evidence given as to the opinion of a witness should be considered—of the opinion, mark you, of a witness—should be considered and weighed by you with caution. You are to carefully separate, if a witness is introduced as an expert, what he testifies to as a fact, and what he testifies as to his opinion. As to facts that he testifies to that came under his observation, of course, his testimony is to be weighed the same as any testimony of any witness who is credible, or whom you find to be credible, who testifies to what he saw, to what he heard, or to what he knew. But when the testimony of the witness entered the domain of opinion, then his testimony should be weighed and considered by you with caution. While the testimony of experts is competent, its weight and credibility is a matter entirely for your consideration. Such testimony should be carefully considered with reference to the supposed or proven facts upon which the opinion of the expert or experts are founded.”

The giving of this instruction is assigned as error prejudicial to the defendant. It is urged that the instruction applied particularly to the expert witness introduced by defendant, and thus singled out his testimony, and directed that it be weighed with caution. Relative to the proper instruction in the submission of expert testimony to the jury, there is apparently much confusion, when the reported cases are examined, and some of them are seemingly irreconcilable. Rogers, *Expert Testimony* (2d ed.), s 206, states the different theories:

“(1) That expert testimony is to be considered like any other testimony in the case, and tried by the same tests.
(2) That expert testimony is to be received with caution.

(3) That expert testimony is entitled to little weight. (4) That expert testimony is entitled to great weight."

From an examination of the authorities, it would seem that some confusion arises when the probative value of opinion evidence and its competency, as legal propositions, are under discussion, and when it is commingled with what should be the proper instructions given to the jury. The great weight of legal opinion seems to be that opinion evidence is less reliable, less valuable, than evidence of facts. This view is frequently expressed by eminent jurists. Judge MILLER in *Middlings Purifier Company v. Christian*, 4 Dill. 448; also *Beaubien v. Cicotte*, 12 Michigan, 459; *Grigsby v. Clear Lake Water Co.*, 40 Cal., 396; *Hayes v. Wells*, 34 Md. 512. But it does not necessarily follow that such expressions of the value of expert testimony, although correct and the general view, should be embodied in instructions to a jury. It certainly cannot be laid down as a general rule to be given to a jury that expert testimony is of great value or little value. In fact, it may sometimes be of great value, and sometimes valueless. It depends on a variety of circumstances which ought to be considered, among which the most important are the extent of the knowledge of the expert, his opportunities for observation, and his skill and experience. It would seem then that the first view is correct; that is, that such testimony is to be considered and weighed by the same tests as other testimony, although it may be appropriate for the court, according to the nature of the trial and the evidence, to explain something of the nature of expert testimony, and to define the difference between the witness who testifies to facts and one who testifies to his opinion; and perhaps all of the instruction under consideration cannot be said to be objectionable. But the court, in the instruction, applies it principally to one witness, and, after an injunction to carefully weigh, adds that this must be done with caution, and repeats in the instruction that this testimony must be considered with caution. The contention of counsel for appellant that the use of the word "caution" repeated in the connection in which it was placed, tended to single out and impair the weight of the evidence given by the expert, seems reasonable; and, under the distinction between the functions of the court and those of the jury, fundamental in the

trial of law cases, the competency of evidence must be determined by the court, and its weight by the jury. The word "caution" in the sense used here and in other instructions of similar import, has been deemed in other jurisdictions sufficiently prejudicial to reverse the case. *Atchison, etc., R. R. Co. v. Thul*, 32 Kan. 255 (4 Pac. 352, 49 Am. Rep. 484); *People v. Seaman*, 107 Mich. 348 (65 N. W. 203, 61 Am. St. Rep. 326); *Louisville, etc., Ry. Co. v. Whitehead*, 71 Miss. 451 (15 South. 890, 42 Am. St. Rep. 472); *Weston v. Brown*, 30 Neb. 609 (46 N. W. 826); *State v. Hundley*, 46 Mo. 414; *Burney v. Torrey*, 100 Ala. 157 (14 South. 685, 46 Am. St. Rep. 33); *Eggers v. Eggers*, 57 Ind. 461; *Pannell v. Commonwealth*, 86 Pa. St. 260. It is true, a contrary ruling has been made by some of the courts. See *United States v. Pendergast*, 32 Fed. 198; *Whitaker v. Parker*, 42 Iowa, 585; *People v. Perriman*, 72 Mich. 184 (40 N. W. 425). The last case seems to have been disapproved in *People v. Seaman*, *supra*.

For error in this instruction, the judgment is reversed, and the cause remanded for a new trial.

HADLEY, FULLERTON, WHITE and MOUNT, J. J., concur.

HIGGINS V. WREN.

Supreme Court of Minnesota. 1900.

79 Minnesota, 462.

Action in the district court for Wright county to recover \$200, and interest, damages for the conversion of a note and mortgage. Lizzie Stowell intervened. The case was tried before Giddings, J., and a jury, which rendered a verdict in favor of plaintiff and against defendant and the intervenor for \$263. From an order denying a motion for a new trial, the intervenor appealed. Reversed.

COLLINS, J.

On the trial of this cause there was testimony received tending to impeach one of the defendants who had testified as a witness, as unworthy of credit, on the ground of general bad reputation for truth and veracity in the neigh-

borhood wherein he resided. The court subsequently charged the jury as follows:

"If the jury believe from the evidence in this case that the reputation of any witness in this case for truth and veracity in the neighborhood where they reside is bad, then the jury have a right to disregard his whole testimony, and treat it as untrue." At this point defendant's counsel called special attention to the words "treat it as untrue," and thereupon the court resumed thus: "That is, you have a right to treat his testimony as untrue; that is, you have the right—the law does not require that you must, but that you have the right—to treat it as untrue, except where it is corroborated by other creditable evidence, or by facts and circumstances proved on the trial."

To this part of the charge counsel reserved an exception. We are of the opinion that this statement of the law was altogether too broad. This instruction authorized the jury to wholly disregard and reject all of the testimony given by the witness if satisfied that his general reputation for truth and veracity was bad in the neighborhood in which he resided, no matter how truthful all or a part of such testimony might in itself, and standing alone, appear to be. It is true that this language was taken bodily from a well-known work on instructions to juries, but the author cites no authority in support of it. Nor do we find any. We are of opinion that the instruction upon this point approved in *State v. Miller*, 53 Iowa, 209, 4 N. W. 1083, is one which will be better understood and much better serve the purpose, as follows:

"Where it is shown that the reputation for truth of a witness is bad, his evidence is not necessarily destroyed, but it is to be considered under all the circumstances described in the evidence, and given such weight as the jury believe it entitled to, and to be disregarded if they believe it entitled to no weight."

The successful impeachment of a witness merely affects his credibility.

Order reversed.

FIFER V. RITTER.

*Supreme Court of Indiana. 1902.**159 Indiana, 8.*

HADLEY, J. * * *

* * * * *

Complaint is made of certain instructions given to the jury. Number two informed the jury that they were the exclusive judges of the credibility of the witnesses and of the weight of their testimony, and that in determining these things they must take into consideration the interest, the appearance upon the witness stand, the intelligence, the opportunities for learning the truth concerning the things testified about, the apparent candor and correctness of the statements as compared with the usual and ordinary nature of things. The particular assault upon the instruction is directed against the word *must*, as being an encroachment upon the absolute and exclusive right of the jury. We can not adopt this view. *Must* is here employed in the sense of duty, and the term is equivalent to telling the jury that it was their duty to consider the matters enumerated in estimating the credibility and weight of the testimony. And it clearly was their duty. It was unquestionably their duty to decide the case according to the weight,—that is according to the convincing force, of the evidence, honestly arrived at, and just as plainly their duty to test the value of the testimony of each witness by such tests as common experience has proved to be reliable. Will any one say that a juror may discharge his duty by closing his eyes to the manner, conduct, and appearance of witnesses while delivering their testimony, and giving to the naked words of each witness full and equal probative force? The competency of evidence is one thing, and its weight another. Competency is purely a question of law for the court to declare. Its weight is a question for the jury to determine. So when a judge tells the jury that it is *proper* for them to consider the interest, manner, etc., of the witnesses, as it is usually phrased, he is but ruling as he may rightly rule that such evidence is competent; and, in searching for the fact established by the evidence, it is the duty of the

jury to consider all competent evidence that may throw light upon the truth, and it is no less essential to a correct result, and quite as much the jury's duty to consider facts and circumstances properly before them, which go to discredit a witness or to strengthen his testimony, as it is to consider the statements made by the witnesses. The cases of *Woollen v. Whitacre*, 91 Ind. 502, *Unruh v. State, ex rel.*, 105 Ind. 117, *Duvall v. Kenton*, 127 Ind. 178, and perhaps some others, so far as they may seem to hold to a different rule, are no longer authorities upon the question here involved. That which seems the more reasonable view expressed above, and which follows *Deal v. State*, 140 Ind. 354, 366, *Newport v. State*, 140 Ind. 299, 302, *Smith v. State*, 142 Ind. 288, and *Keesier v. State*, 154 Ind. 242, may now be said to be the approved rule.

* * * * *

We find no error in the record.

Judgment affirmed.

(e) *Falsus in Uno, Falsus in Omnibus.*

CHICAGO AND ALTON RAILROAD COMPANY V.
KELLY.

Supreme Court of Illinois. 1904.

210 Illinois, 449.

MR. JUSTICE HAND delivered the opinion of the court:

This was an action on the case brought by the appellee to recover damages for the death of his intestate, Joseph G. Kelly, occasioned, as is alleged, by the negligence of the appellant in failing to stop its train, upon which Kelly was a passenger, at Braidwood station a sufficient length of time to enable Kelly to alight therefrom with safety, by means whereof said Kelly, while in the exercise of due care for his own safety and while attempting to leave said train at said station, was thrown beneath the wheels of said train and run over and killed. The case was tried before the court and a jury, and the jury returned a verdict

against the appellant for the sum of \$4000, upon which verdict the court, after overruling a motion for a new trial, rendered judgment in favor of the appellee, which judgment has been affirmed by the Appellate Court for the Second District, and the record has been brought to this court by appeal for further review.

The intestate of appellee, on the evening of November 15, 1900, boarded appellant's train at Joliet and paid his fare to Braidwood. The train arrived at Braidwood a little after eleven o'clock P. M., when Kelly arose from his seat in the smoking car, shook hands with a friend with whom he had been talking, and started for the rear door of the car to get off the train. The testimony of appellee tended to show that the train stopped from twelve to thirty seconds; that it started before Kelly had time to get off, and that in attempting to get off, the motion of the train caused him to lose his balance and he was thrown down and run over by the train and killed; while the testimony of the appellant tended to show that the train stopped from two to three minutes, during which time the engine took water; that the deceased had ample time in which to alight from the train in safety, and that he lost his life by reason of his own negligence in attempting to leave the train while it was in motion and after it had stopped a sufficient length of time for him to alight therefrom in safety.

There was upon the question of the length of time the train stopped at the Braidwood station,—which was a material question,—a sharp conflict in the evidence, and in that state of the record it was important that the jury should have been correctly instructed as to the law of the case, especially as to the rule which should govern them in weighing the evidence of the respective witnesses. On behalf of the appellee the court gave to the jury the following instruction, the giving of which has been assigned as error:

“If the jury believe, from the evidence in this case, that any witness who testified in the case has willfully sworn falsely as to any matter or thing material to the issues in this case, then the jury are at liberty to disregard the entire testimony of such witness, except in so far as it may have been corroborated by other credible evidence which

they do believe, or by facts and circumstances proved on the trial.”

It has been repeatedly announced as the law of this State, that the jury are at liberty to disregard the evidence of a witness who upon the trial has willfully sworn falsely to a material fact, except in so far as such witness has been corroborated by other credible evidence or by facts and circumstances proven upon the trial. (*Crabtree v. Hagenbaugh*, 25 Ill. 233; *Swan v. People*, 98 id. 610; *Hoge v. People*, 117 id. 35; *Bevelot v. Lestrade*, 153 id. 625.) The instruction is much broader than the rule announced in the foregoing cases, as it informed the jury they were at liberty to disregard the testimony of any witness who had willfully sworn falsely to any matter or thing material to the issues, except in so far as such witness had been corroborated by other credible evidence *which they do believe*, the effect of which was to eliminate from the consideration of the jury the evidence of any witness, if any such there were, who had willfully sworn falsely upon a material matter, even though he were corroborated by other credible evidence, unless the jury believed such other credible evidence to be true. If the jury may disregard the testimony of such a witness unless he is corroborated by other credible evidence which they believe, then the jury may disregard the evidence of such a witness even though he be corroborated by other credible evidence, which would be in violation of the rule established by this court. It is not the duty of the jury to accept as true the testimony of a witness who has testified willfully falsely as to a material fact simply because he is corroborated by other credible evidence, but when such witness has been corroborated by other credible evidence it is the duty of the jury to consider his testimony in connection with such corroborating evidence and the other evidence in the case, and to give to it such weight as they may be of opinion it is entitled to receive at their hands. The error in the instruction under consideration is found in this: that it permits the jury to refuse to consider the testimony of a witness who has willfully sworn falsely with reference to a material fact, although he is corroborated by other credible evidence, unless the jury believe the other credible evidence to be true. Credible evidence is not evidence which is necessarily true, but is evi-

dence worthy of belief,—that is, worthy to be considered by the jury. If it were held the jury were not to consider the evidence of a witness who had willfully sworn falsely to a material fact unless he was corroborated by other credible evidence, and then only when they believe such credible evidence to be true, it would, in effect, be to hold that the testimony of such a witness is only to be considered by the jury after they have become satisfied of the truth of the facts testified to by the corroborating witnesses. If this were the rule, the jury would have reached a conclusion as to the truth of the matter about which the witness testified before they would be required to consider the evidence of the witness, which would make the consideration of the testimony of such witness unnecessary, even though his testimony were corroborated by other credible evidence.

We are of the opinion the instruction is in conflict with a long established rule of evidence in force in this State and that the giving thereof constituted reversible error.

The judgment of the Appellate and circuit courts will be reversed and the cause remanded to the circuit court for a new trial.

Reversed and remanded.

CAMERON V. WENTWORTH.

Supreme Court of Montana. 1899.

23 Montana, 70.

MR. JUSTICE HUNT delivered the opinion of the court.

Plaintiff brought two separate actions in claim and delivery to recover possession of two certain race horses. By consent, the two suits were consolidated for the purposes of trial. Plaintiff recovered a verdict, and judgment was entered in his favor. Defendant Wentworth moved for a new trial, which motion was granted. Plaintiff appeals from the order granting a new trial.

1. One of the grounds upon which the court granted the motion for a new trial was its error in giving the following instruction.

“It is the duty of the jury, in passing upon the credibility of the testimony of several witnesses, to reconcile all the different parts of the testimony, if possible. It is only in cases where it is probable that a witness has deliberately and intentionally testified falsely as to some material matter, and is not corroborated by other evidence, that the jury is warranted in disregarding his entire testimony. Although a witness may be mistaken as to some of his evidence, it does not follow, as a matter of law, that he has wilfully told an untruth, or that the jury would have the right to reject his entire testimony.”

Plaintiff contends that the word “probable” was used for “palpable” by mistake, and that the error, if any was not calculated to mislead the jury. This argument is premised upon the assumption that if “palpable” had been used, the instruction would have been a correct statement of the law,—an assumption which respondent seems to have regarded as well taken, and which, for the moment, we will not disturb.

It is undoubtedly the rule that, where a witness has willfully sworn falsely as to any material matter upon the trial, the jury is at liberty to discard his entire testimony, except in so far as it has been corroborated by other credible evidence; but we do not understand the right to so discard testimony follows, if it be merely *probable* that the witness has willfully sworn falsely. In other words, there must be a belief in the minds of the jury that a witness has actually and knowingly testified falsely as to some material matter before they are at liberty to eliminate his testimony entirely; but a belief that an actual fact exists requires a considerably stronger support than does a belief that it *probably* exists. If a witness has palpably sworn falsely, it is almost self-evident that he has done so. The range of probability is passed over, and it has become more than likely that he has testified falsely, knowingly and intentionally. Therefore, where perjury is palpable, there need be no extended discussion upon which to base a finding that the witness has willfully testified falsely,—the jury may at once act upon the fact so obviously or palpably demonstrated. But to say that a jury can discard testimony, if they conclude that a witness has *probably* perjured himself, is to authorize deliberation, not upon the question of

whether he has *willfully* sworn falsely, but upon whether it is *likely* he has done so. So, although the jury might not say they believed the witness did willfully testify falsely, yet, if they could say that it was *probable* or likely that he did so testify, nevertheless the right to discard the entire testimony would exist. Reasoning along this line carries us to where it is easily seen that a jury would diverge in their consideration of evidence, and too often overlook the necessity for belief in existing facts, amid metaphysical gropings for probabilities, to enable them to ignore testimony. They should not be allowed to do this; for if, in their judgment, probability of perjury alone exists, they cannot legally give that effect to evidence which they may, if, in their judgment, the fact of perjury exists as demonstrable beyond a mere probability that it exists. Therefore, to expressly authorize a jury to act, in discarding testimony, on probability, is wrong. It becomes an authorization to them to judge of the effect of evidence arbitrarily, and weakens, if it does not break down, the force of that other and salutary rule which always confines the power of a jury to form a judgment upon evidence within the exercise of legal discretion, and in subordination to the rules of evidence.

But it is our opinion that the premise which would regard the instruction as sound, if it had read "palpable" instead of "probable," is false and unsound, and that the instruction would still be inherently bad with the word "palpable" imported into it, for the reason that it circumscribes the power of the jury in giving effect to evidence by limiting their right to discard the testimony of a witness to those instances *only* where it is *palpable* the witness has willfully sworn falsely, and is not corroborated by other evidence. No such principle can find favor where the jury are the exclusive judges of the credibility of a witness, and where they are authorized to ignore his testimony, if willfully false, and not corroborated. It may be that a jury, after full consideration of all a witness has testified to, will believe he has perjured himself, yet it may not have been readily observed at all on the trial that the witness willfully swore falsely. Now, under such conditions, the jury have as clear a right to discard his testimony as they would have had if it had been palpable that the witness was willfully falsifying; for the test necessarily is: has the

witness willfully sworn falsely as to any material matter? and this is to be ascertained by the jury as a fact, deducible from other facts or circumstances connected with the trial and before them for consideration. But, in sifting and weighing the evidence, if the fact is found, whether it has manifested itself *palpably*, or whether it has been arrived at by processes of reasoning upon other facts or circumstances, is absolutely immaterial in its effect upon the power of the jury to discard the testimony.

We therefore disapprove of the instruction from the two standpoints discussed. It is essentially erroneous, and the text of Mr. Sackett (page 35), which gives it as the law, finds no support in any language used by the court in *Gottlieb v. Hartman*, 3 Colo. 53, which is cited as authority for its doctrine. It follows that the action of the court below in granting a new trial must be affirmed.

Another ground for granting a new trial was the refusal of the court to give the following instruction requested by defendant: "You are further instructed that a witness who testifies falsely in one part of his testimony is to be distrusted in other parts of his testimony." The instruction offered is substantially the language of Subdivision 3 of Section 3390 of the Code of Civil Procedure, which provides that the jury are to be instructed on all proper occasions "that a witness false in one part of his testimony is to be distrusted in others." Presumably the case was one where the court should have given the instruction requested, or the substance of it, by way of caution to the jury upon effect of evidence. And we can readily understand the aid furnished to a jury by declaring to them the principle meant to be enunciated by the statute, that a witness who has willfully testified falsely as to any material matter must be distrusted as to other parts of his testimony. The statute is not applicable, however, to unintentional errors, or evidence given upon immaterial matters, and without intent to deceive. Its sense is to require the jury to distrust only a witness who willfully swears falsely as to material matters; and we are of opinion that it ought always to be given with the words "willfully" and "material" expressed as qualifications of the rule it declares.

The statute (Sec. 3390, *supra*) came to us from California (Code Civ. Proc. Cal. Sec. 2061), where it has been interpreted as applicable only to a witness who is willfully

false in a material manner (*People v. Hicks*, 53 Cal. 354; *People v. Soto*, 59 Cal. 367); and, while it has been held in that state that the word "false" is not the equivalent of "mistake", and that the word "willfully" does not change the effect of the instruction as offered (*People v. Sprague*, 53 Cal. 491; *People v. Righetti*, 66 Cal. 184, 4 Pac. 1063, 1185; *White v. Disher*, 67 Cal. 402, 7 Pac. 826), nevertheless we are satisfied that the meaning should be made perfectly clear by avoiding the opportunity for misunderstanding that may reasonably exist by adopting the construction of the supreme court of California announced in the cases heretofore cited and followed in *State v. Kyle*, 14 Wash. 550, 45 Pac. 147, holding that the qualifying words need not be expressed.

As a statute affecting the province of the jury in weighing evidence, it *requires* them to view with distrust the testimony of a witness who willfully swears falsely as to a material matter. They must distrust such a witness, and, under their general power of passing upon the credibility to be attached to each witness, they *may* discard such testimony entirely, except in so far as it is corroborated by other credible evidence. (*People v. Durrant*, 116 Cal. 179, 48 Pac. 75.)

* * * * *

The order granting a new trial must be affirmed.

Affirmed.

WARD V. BROWN.

Supreme Court of Appeals of West Virginia. 1903.

53 West Virginia, 227.

POFFENBARGER, Judge:

* * * * *

* * * The court, on its own motion, gave the following: "The court instructs the jury, that they are the judges of the evidence and the weight to be given thereto and of the credibility of witnesses testifying in this case; that if they believe that any witness has testified falsely in this case as

to any matters in issue, that then the jury have the right to disregard such false testimony or give to it and all the evidence of such witness such weight as the jury may in their opinion believe it was entitled to." The action of the court in giving this instruction is also complained of, it being insisted that the jury should not have been told that they might give to the false testimony such weight as they might think it entitled to. Instructions of this class have been carefully considered in *State v. Thompson*, 21 W. Va. 741, in which the following was approved as a correct enunciation of the law: "If the jury believe from the evidence that any witness who has testified in this case has knowingly and willfully testified falsely to any material fact in the case, they may disregard the whole testimony of such witness, or they may give such weight to the evidence of such witness on other points as they may think it entitled to. The jury are the exclusive judges of the weight of the testimony." In *Thompson on Trials*, section 2,425, this instruction is approved as a good model. It is difficult to see, however, how the jury could believe testimony which they had found to be false could be entitled to any weight, and the court told them they could give only such weight as they might believe it entitled to. They were not directed to give it any weight. The instruction left it wholly dependent upon whether they believed it entitled to any weight. But the instruction is bad in this, that it does not inform the jury that they may reject the whole of the testimony of the witness who willfully testifies falsely as to material matters.

* * * * *

For the errors noted, the decree entered in this cause on the 29th day of April, 1899, by the circuit court of Kanawha County, must be reversed, the verdict of the jury set aside and a new trial of the issue awarded.

Reversed, remanded.

CHAPTER XII.

ARGUMENT AND CONDUCT OF COUNSEL.

BALDWIN'S APPEAL FROM PROBATE.

Supreme Court of Errors of Connecticut. 1878.

44 Connecticut, 37.

Appeal from a decree of a probate court disallowing the will of Sarah Baldwin; taken to the Superior Court in New Haven County. The appellant was a devisee and legatee under the will. The case was tried to the jury, on the issue of the soundness or unsoundness of the mind of the testatrix, before Sanford, J.

After the evidence on both sides had been introduced, one of the counsel for the appellant, while making the opening argument, proposed to read to the jury from the decisions of courts in this country and in England, where wills had been sustained notwithstanding the objections which had been made to them founded upon the alleged testamentary incapacity of their makers, for the purpose of showing that the facts set forth in such cases were not inconsistent with the legal signification of soundness of mind, as applied to the making of wills. The counsel for the appellee objected to such reading, on the ground that it would divert the attention of the jury from the case on trial, and that the jury had no right to be influenced by what other courts or juries had done or decided in any other case. The court overruled the objection, and allowed the cases to be read.

The jury having returned a verdict for the appellant, sustaining the will, the appellee moved for a new trial for error in the above ruling of the court. Other questions were made, which it is not necessary to state, as they were not considered by the court.

* * * * *

CARPENTER, J. On one point in this case we feel con-

strained to grant a new trial. Some of the other questions discussed are not free from doubt; but in respect to them we express no opinion, as they will not necessarily arise upon another trial.

The counsel for the appellant were permitted, against the objection of the appellee, to read to the jury, from books, cases decided in other states and in England, "for the purpose," as it is stated in the motion, "of showing that the facts as set forth in such cases were not inconsistent with the legal signification of 'soundness of mind,' as applied to the making of wills."

The duties of the court and of the jury in the trial of civil causes are distinct and clearly defined. It is the duty of the court to declare the law to the jury; and that carries with it a corresponding obligation on the part of the jury to receive the law only from the court. They have no right to receive the law from books, nor from counsel, nor are they permitted to act upon their own notions of law, but the law as laid down by the court is to be the law of the case for them.

It is also the duty of the court to decide what evidence may and what may not go to the jury; and the law declares that all evidence submitted to the jury shall be under the sanction of an oath. It is the duty of the jury therefore to hear and consider only such evidence as the court permits to be given, and such only as is under oath.

Whether the matter read to the jury be regarded as matter of law, as a statement of facts, or as a mixture of law and fact, it is equally objectionable. If as matter of law, then the jury were receiving the law, which was to guide their deliberations, from an unauthorized and dangerous source. If as matter of fact, then the jury were listening to evidence which was not only irrelevant, and could have no legitimate bearing upon the question before them, but it was admitted after the evidence was closed and the argument commenced, and without any legal sanction whatever, not even being subjected to the test of a cross-examination. If regarded as a mixture of law and fact, then all the objections which may be urged against it when viewed as law or fact, apply in full force. In whatever aspect viewed its tendency was bad, diverting the minds of the jury from

the real question they were to try, and the legitimate and proper evidence in the case.

This is not the ordinary case of reading an authority to the court upon a question of law in the presence of the jury, as the counsel for the appellant seems to intimate. The motion shows that it was proposed to read the cases *to the jury*. The reading was objected to "on the ground that it would divert the attention of the jury from the case on trial, and that the jury had no right to be influenced by what other courts or juries had done or decided in any other case." The court, in overruling this objection, must have caused the jury to understand that it was proper for them to consider the facts stated in those cases, and the action of the courts and juries thereon, in connection with the evidence in this case in making up their verdict, and they may have been, and probably were, influenced thereby. Whatever effect they had, whether much or little, was improper and tended to prejudice the appellee.

The view we take of this question is in harmony with the law as laid down elsewhere. *Ashworth v. Kittridge*, 12 Cush. 193; *Commonwealth v. Wilson*, 3 Gray, 337; *Washburn v. Cuddihy*, 8 Gray, 430; *Phoenix Ins. Co. v. Allen*, 11 Mich. 501; *People v. Anderson*, 44 Cal. 65; *Carter v. The State*, 2 Carter's Ind. R., 617.

We advise a new trial.

In this opinion the other judges concurred.

LOUISVILLE & NASHVILLE RAILROAD COMPANY V. REAUME.

Court of Appeals of Kentucky. 1908.

32 Kentucky Law Reporter, 946.

Opinion of the court by Judge CARROLL, reversing.

Appellee, who was a passenger on one of appellant's trains, was injured by the derailment of the train at a point near Zion station, on the line of its railroad between Cincinnati and Louisville. In an action brought by her to recover damages for injuries received, the jury returned a verdict in her favor for ten thousand dollars.

* * * Much is also said about the misconduct of appellee's counsel in continuing to ask questions that the trial court had ruled incompetent. It is improper for counsel to persist in asking questions that the court has ruled to be incompetent, the purpose being to impress the jury with the importance of the facts that have been excluded from their consideration. When the court has sustained an objection to a question, it is the privilege of counsel to make an avowal as to what the witness would say if permitted to answer, and this avowal he has the right to have put in record for the purpose of an appeal. But the question excluded should not be again asked the same witness in like or a different form, unless it be that the objection was made to the question because of the form in which it was put. If this is the ground upon which the objection is based, counsel should, of course, be permitted to ask the question in proper form, so that the objection may go to the competency or relevancy of it. As an illustration of the manner in which counsel for appellee sought to get before the jury incompetent evidence, he repeatedly asked, in different forms and ways—if the railroad company had not settled or attempted to settle with other persons injured in the same wreck; and also concerning the condition of the health of appellee's father and other members of her family. A party will not be permitted, by indirect means, to acquaint the jury with facts which he is not allowed to bring to their notice by direct evidence. If this practice was permitted to go without criticism, or could be indulged in, without suffering the penalty of reversal, the trial judge, after exhausting all other means, could not, unless he felt inclined to resort to contempt proceedings, prevent the mind of the jury from being prejudiced by the efforts of counsel to put before them, in an indirect way, evidence that was incompetent. Skilled counsel in resorting to practices of this character, have in view the effect that it will produce on the jury and their expectations are too frequently well founded, as it is difficult for a jury to escape from being impressed in some manner by the insistence with which damaging, but incompetent, evidence is offered and the objections of adverse counsel to it sustained. If a practice of this kind is persistently indulged in by counsel, although the trial judge repeatedly tried to prevent it, it

would as surely be grounds for reversal as any other substantial error that a party might commit in the trial of a case. The orderly conduct of the trial, the professional and personal deportment of counsel, the examination of witnesses, and all other matters connected with the proceedings are under the control of the trial judge, and he has ample power and authority to enforce his rulings and to prevent counsel from disobeying them. But, the trial judge is often reluctant to resort to extreme measures in dealing with attorneys engaged in the trial of a case, and is content to sustain objections that are made, and let the disapproved conduct pass with this, or a slight reprimand, that at times is unheeded, but this court will not permit the non-action of the trial judge, or rather his failure to take such action as may be necessary to effectually restrain counsel to prejudice the rights of one of the parties, but will take such action as to it, under all the circumstances, seems right and proper. The distinguished counsel who tried the case for appellee, has since died. He was an able, resourceful and zealous lawyer. His experience on the bench, where he presided with honor and dignity, well qualified him to understand and appreciate when counsel, in the trial of a case, were overstepping the bounds of propriety, and he must have known, as did the excellent judge before whom this case was tried, that the evidence he was trying to get before the jury was wholly irrelevant and incompetent. Except for the fact that this case, on a retrial, will be conducted by other counsel, and our failure to call attention to the misconduct of former counsel might leave the impression that it was not open to criticism, we would not, under the circumstances, direct attention to it.

* * * * *

WAGONER V. HAZLE TOWNSHIP.

*Supreme Court of Pennsylvania. 1906.**215 Pennsylvania State, 219.*

Opinion by Mr. Justice MESTREZAT, May 7, 1906.

The proximate cause of Mrs. Wagoner's injuries was the hole or opening in the bridge, and if the jury found, as they did, that the hole was caused by the negligence of the defendant township, its liability necessarily followed.

* * * * *

The question of Mrs. Wagoner's contributory negligence was for the jury. The facts were not undisputed. The plaintiffs claim that after the wheel of the wagon had gone into the opening in the bridge she attempted to alight from the wagon, and was in the act of doing so at the time it was struck by the car of the Lehigh Traction Company, and that her conduct in no way contributed to her injuries. What she did on that occasion, and whether she acted with the prudence required of her, were for the jury.

Prior to the present action the plaintiffs brought suit against the Lehigh Traction Company to recover damages for the same injuries, and obtained a verdict of \$6,000. The case, on appeal, was heard by this court last year, and the judgment was reversed and a new trial was awarded. On the trial of the present action the counsel for the plaintiff in the presence of the jury and where they could distinctly hear it, made the following offer: "We now offer in evidence the record in that case, for the purpose of showing that the jury gave the plaintiff a verdict of six thousand dollars, and that the case was appealed to the Supreme Court and that the Supreme Court reversed the judgment of the court below, practically saying that it was not responsible, but that the township was bound to keep its own road in repair." Thereupon the defendant's counsel said: "We object and move that a juror be withdrawn, because of the statement made by the attorney for the plaintiff, in full voice before the jury, as to the amount of the other verdict." The court declined to withdraw a juror and the defendant excepted to the ruling. We think the court committed error for which the judgment must be reversed.

The offer was clearly incompetent, and the only purpose it could serve, or effect it could have, would be to place before the jury the amount of the large verdict in the Lehigh Traction Company case. The counsel should not have made the offer, and after he had made it, it was the duty of the court to protect the defendant against its effect. The purpose of the offer was obvious, and its effect would be equally apparent. Such conduct on the part of counsel is different from an unintentional or inadvertent remark to a jury which does the opposite party no injury. When such remarks are made they may or may not have an influence upon the jury, but there can be no question about the effect upon the tribunal of an offer to show what a former jury, dealing with the same facts, had determined as to the amount of damages due the plaintiffs for the injuries which they sustained. It was a criterion for the jury in considering the case which they evidently would accept, and which no language of the trial judge could drive from their minds. The offer got before the jury what was clearly incompetent and what manifestly would, to some extent at least, control their verdict. The only way to remedy the wrong was to withdraw a juror and compel the plaintiffs to submit the cause to another jury, uninfluenced by such wholly irrelevant and incompetent matter.

* * * * *

When an attorney in the trial of a cause willfully and intentionally makes an offer of wholly irrelevant and incompetent evidence, or makes improper statements as to the facts in his address to the jury, clearly unsupported by any evidence, which are prejudicial and harmful to the opposite party, it is the plain duty of the trial judge, of his own motion, to act promptly and effectively by reprimanding counsel and withdrawing a juror and continuing the cause at the costs of the client. In no other way can justice be administered and the rights of the injured party be protected. The imposition of the costs will remind the client that he has an attorney unfaithful to him as well as to the court. The obligation of fidelity to the court which an attorney assumes on his admission to the bar is ever thereafter with him, and when he attempts to defeat the justice of a cause by interjecting into the trial wholly foreign and irrelevant matter for the manifest pur-

pose of misleading the jury, he fails to observe the duty required of him as an attorney and his conduct should receive the condemnation of the court. This condemnation can and should be made effective.

The ninth assignment of error is sustained and the judgment of the court below is reversed with a venire facias de novo.

M'CARTHY V. SPRING VALLEY COAL COMPANY.

Supreme Court of Illinois. 1908.

232 Illinois, 473.

This is an action on the case in the circuit court of Bureau county to recover damages for personal injury sustained in the appellant's coal mine. * * *

MR. JUSTICE DUNN delivered the opinion of the court:

* * * * *

Complaint is made of the conduct of counsel for the appellee in the course of the trial. The counsel who made the opening statement to the jury began: "In this case Patrick McCarthy, thirty-three years of age, with a wife and five children," when he was interrupted with an objection, which the court sustained. In cross-examining one of appellant's witnesses in regard to the taking of a written statement of a witness for the appellee at the office of appellant, appellee's counsel asked if Mr. Bayne, the attorney of the Aetna Insurance Company, was present. On objection the question was withdrawn, counsel saying that he meant Mr. Bayne, the attorney for The Spring Valley Coal Company. Several objections were also made in the course of the argument of appellee's counsel to the jury.

The statement to the jury that the appellee had a wife and five children was manifestly improper. Its only object could have been to enhance the damages by getting before the jury, in this improper and unprofessional manner, facts calculated to arouse their sympathy, which counsel knew could not in any legitimate way be brought to their attention. To admit evidence of such facts is error. (*Jones &*

Adams Co. v. George, 227 Ill. 64.) The fact once lodged in the minds of the jury could not be erased by an instruction, and appellee by this statement secured the benefit of the fact to the same extent as if he had introduced evidence to prove it.

The question in which Mr. Bayne was referred to as the attorney of the Aetna Insurance Company was also justly subject to criticism. The question asked was as follows: "At the time that this statement was taken from Luke Frain at the office of The Spring Valley Coal Company, was Mr. Bayne, the attorney for the Aetna Insurance Company, there?" It is as strange as it is unfortunate that this question should have been asked through mere inadvertence, as stated in appellee's brief. It is strange that with the name of appellant in counsel's mouth, the name of Mr. Bayne, who was then present assisting in the trial as attorney for the appellant, should have associated itself in counsel's mind and speech with the name of the Aetna Insurance Company as attorney instead of with the name of the appellant. The question and the circumstances were well adapted to intimate strongly to the jury that the appellant was insured against liability for accidents of this character, and that the party which would have to respond for any judgment which might be rendered was the Aetna Insurance Company. Evidence of this character was not competent. The intimation may not have been true, and it is unfortunate that the suggestion should have been inadvertently made. The only effect it could have would be to convey an improper impression to the jury.

* * * * *

The Appellate Court required a *remittitur* of \$2000 from the judgment as the alternative of a reversal on account of the effect on the minds of the jury of the improper statement in regard to appellee's wife and children. Such *remittitur* does not, however, cure the error. (*Jones & Adams Co. v. George, supra.*) It is impossible to tell the effect, on the verdict, of the impressions wrongfully conveyed to the jury's mind by the improper conduct of counsel.

The judgment will be reversed and the cause remanded for a new trial.

Reversed and remanaed.

BROWN V. SWINEFORD.

*Supreme Court of Wisconsin. 1878.**44 Wisconsin, 282.*

Action for an assault and battery.

RYAN, C. J. * * *

* * * * *

II. Following for once a bad practice, the learned counsel for the respondent, in closing the argument of the case to the jury, forgot himself so far as to exceed the limits of professional freedom of discussion.

It appears by the bill of exceptions, that he waived the opening argument to the jury. A very strict rule might hold this to give the other side the right to close. If such a waiver should still leave the closing argument to the plaintiff, it certainly confined it to a strict reply to the defendant's argument, excluding general discussion of the case. The sole object of all argument is the elucidation of the truth, greatly aided in matters of fact, as well as in matters of law, by full and fair forensic discussion. And this is always imperiled when either party, by any practice, is able to present his views of the case to the jury without opportunity of the other to comment on them. And if the party entitled to the opening argument, relying on the strength of his case without discussion, waive the right to open, he waives the right to discuss the case generally, and should not be permitted to do so out of his order, and after the mouth of the other party is closed. His close, if permitted to close the argument, should be limited to comments on the argument of the other side. This is essential to the fairness and usefulness of juridical discussion at the bar.

It sufficiently appears in the present case, that the learned counsel for the plaintiff did not properly confine his closing argument to a reply. It is very doubtful if that alone would be error sufficient to reverse the judgment, if an exception had been taken by the appellant, which does not appear to be the case. But the learned counsel went beyond the legitimate scope of all argument, by stating and commenting on facts not in evidence.

In actions of tort, calling for exemplary damages, evidence of the pecuniary ability of the defendant to pay them is admissible. *Birchard v. Booth*, 4 Wis. 67; *Barnes v. Martin*, 15 Wis. 240. This appears to be, as Mr. Justice Cole remarks in *Birchard v. Booth*, a fair corollary of the rule of exemplary damages. Perhaps the corollary is not better founded in principle than the rule; but the court takes them as it finds them established.

It appeared in evidence, that the appellant was an officer of a railroad company, and that the *locus in quo* was within depot grounds of the company. No evidence appears to have been given of the ability of the appellant to pay exemplary damages. The learned counsel appears to have undertaken to supply this want of evidence, by commenting to the jury upon the appellant's connection with the railroad company, and the wealth and power of the company as a great corporation, and the defendant's ability, from his connection with it, to pay any judgment which might be rendered against him. The bill of exceptions states, that "no record was kept of these remarks, and the court is unable to state more specifically the substances of the language used." But enough appears to show, not that the learned counsel commented on facts not in evidence, but in effect testified to the facts himself. It was in effect telling the jury that the appellant's position with the corporation gave him the ability to pay large damages, and nearly—if not quite—that they might measure the damages by the wealth of the railroad company itself.

Amongst other evidence of the appellant's ability to pay, it might undoubtedly have been shown that he received large emoluments from his position in the railroad company; and possibly that the railroad company had assumed the appellant's tort and the payment of the judgment. And it was not the duty or the right of counsel, was not within the proper scope of professional discussion, to assume the facts as proven, or to state them to the jury as existing; founding his argument *pro tanto* upon them. And this was the more marked in the present case, because it was made for the first time in what should have been a mere reply; and still more, because the court below had already admonished counsel to confine himself to the evidence, and not to go outside of the record.

The appellant took his exceptions; and his counsel now supports it by numerous cases, some of which are—as far as they go—admirable discussions of professional ethics, and all of which are well worth the attention of the bar. All of them support the rule now adopted by this court, that it is error sufficient to reverse a judgment, for counsel, against objection, to state facts pertinent to the issue and not in evidence, or to assume *arguendo* such facts to be in the case when they are not. Some of the cases go further, and reverse judgments for imputation by counsel of facts not pertinent to the issue, but calculated to prejudice the case. *Tucker v. Henniker*, 41 N. H. 317; *State v. Smith*, 75 N. C. 306; *Ferguson v. State*, 49 Ind. 33; *Hennies v. Vogel*, Sup. Court Ill., 7 Cent. L. J., 18.

There are cases in conflict with those which support this rule. But, in the judgment of this court, the rule is supported by the weight of authority and by principle.

Doubtless the circuit court can, as it did in this case, charge the jury to disregard all statements of fact not in evidence. But it is not so certain that a jury will do so. Verdicts are too often found against evidence and without evidence, to warrant so great a reliance on the discrimination of juries. And, without notes of the evidence, it may be often difficult for juries to discriminate between the statements of fact by counsel, following the evidence and outside of it. It is sufficient that the extra-professional statements of counsel may gravely prejudice the jury and affect the verdict.

The profession of the law is instituted for the administration of justice. The duties of the bench and bar differ in kind, not in purpose. The duty of both alike is to establish the truth and to apply the law to it. It is essential to the proper administration of justice, frail and uncertain at best, that all that can be said for each party, in the determination of fact and law, should be heard. Forensic strife is but a method, and a mighty one, to ascertain the truth and the law governing the truth. It is the duty of counsel to make the most of the case which his client is able to give him; but counsel is out of his duty and his right, and outside of the principle and object of his profession, when he travels out of his client's case and assumes to supply its deficiencies. Therefore is it that the nice sense of

the profession regards with such distrust and aversion the testimony of a lawyer in favor of his client. It is the duty and right of counsel to indulge in all fair argument in favor of the right of his client; but is outside of his duty and his right when he appeals to prejudice irrelevant to the case. Properly, prejudice has no more sanction at the bar than on the bench. But an advocate may make himself the *alter ego* of his client, and indulge in prejudice in his favor. He may even share his client's prejudices against his adversary, as far as they rest on the facts in his case. But he has neither duty nor right to appeal to their prejudices, just or unjust, against his adversary, *dehors* the very case he has to try. The very fullest freedom of speech within the duty of his profession should be accorded to counsel; but it is license, not freedom of speech, to travel out of the record, basing his arguments on facts not appearing, and appealing to prejudices irrelevant to the case and outside of the proof. It may sometimes be a very difficult and delicate duty to confine counsel to a legitimate course of argument. But, like other difficult and delicate duties, it must be performed by those upon whom the law imposes it. It is the duty of the circuit courts, in jury trials, to interfere in all proper cases of their own motion. This is due to truth and justice. And if counsel persevere in arguing upon pertinent facts not before the jury, or appealing to prejudices foreign to the case in evidence, exception may be taken by the other side, which may be good ground for a new trial, or for a reversal in this court.

It is with regret that the court is obliged to hold that both appear to have been done in this case. It was no fair inference for argument that, because the appellant was the servant of a wealthy railroad company, he himself was wealthy; or that the jury might take into consideration, in assessing damages, the power, wealth and influence of the corporation. Popular prejudice against great corporations is, perhaps, a sufficient difficulty in the way of the administration of justice, in cases in which such corporations themselves are parties; it is intolerable that it should be extended to their servants. For all that appears in this case, the appellant may be as poor as Job in his downfall. His wealth, if he had it, was legitimate subject of

evidence, not legitimate subject of argument, without evidence. And his fortune or misfortune in being the servant of a corporation was legitimate ground for no appeal against him in a court of justice.

It is to the honor of the bar that this is the first time that this question has come before this court. Yet it is not to be ignored that the practice here condemned has sometimes been indulged in. And it is, perhaps, not to be regretted that the question has first come here in the case of an eminent member of the bar; a gentleman of high character, personal and professional, known to every member of this court; whose professional ability needs no adventitious aid, and who probably fell into this error casually and inadvertently. His professional standing shields him from personal censure, while it will give emphasis to the rule laid down.

By the Court.—The judgment is reversed, and the cause remanded to the court below for a new trial.

TOLEDO, ST. LOUIS & WESTERN RAILROAD
COMPANY V. BURR.

Supreme Court of Ohio. 1910.

82 Ohio State, 129.

This action was originally commenced in the court of common pleas of Henry county, Ohio, by Burr & Jeakle and The Ohio German Fire Insurance Company as plaintiffs, against The Toledo, St. Louis & Western Railroad Company as defendant, to recover damages from said railroad company for the destruction by fire—alleged to have been communicated by sparks emitted from one of defendant's locomotive engines—of a sawmill owned by said Burr & Jeakle and insured by them in The Ohio German Fire Insurance Company. * * *

CREW, J.—The only error assigned in this case which need be specially considered in this opinion, is that of the alleged misconduct of counsel in the argument of the case to the jury. Upon the argument of this cause in the

court of common pleas one of the counsel for plaintiffs stated to the jury among other things, "that within thirty days after the occurrence of this fire, Mr. Schmettau, as counsel for the defendant, made an offer of settlement, and that offer was repeated as late as the day of the commencement of this trial." To this statement the defendant by its counsel then and there excepted. And thereupon, to quote from the record, "counsel who had made the statement, stated to the jury that he withdrew the statement objected to," and the court then instructed the jury as follows: "Gentlemen of the jury, it becomes my duty to say to you on this question that here is absolutely no evidence in this case that either party ever wanted to settle or that any attempt was ever made to settle; and I will say to you further, as a matter of law, that if the parties had gotten together in an effort to settle this case, the law wouldn't permit such effort to settle to be given to the jury in evidence; it is your duty to disregard absolutely the whole of any statement by any counsel to the effect that any effort was made to settle this case or any other case." And thereupon the argument proceeded. That the statements thus made by counsel transcended the bounds of legitimate argument and were grossly improper, is both obvious and conceded, but it is claimed that any prejudicial effect which such statements may have had was removed or cured by the subsequent action of court and counsel. This conclusion, we think, by no means follows, nor does it affirmatively appear in this case that such conclusion is justified by the facts. While it is true that courts of last resort have frequently, though not uniformly, held the rule to be, that the prejudice, if any, resulting from the misconduct of counsel in argument to the jury may be eliminated or cured by the prompt withdrawal of the objectionable statements made by counsel, accompanied by an instruction from the court to the jury to disregard such statements, yet this rule, so far as our examination of the authorities has disclosed, is recognized and applied by the courts in those cases only, where it is made to appear by the record from a consideration of the character of the statements made, that their prejudicial effect has probably been averted by such withdrawal and instruction. As remarked by Shauck, J., in *Cleveland*,

Painesville & Eastern Railroad Co. v. Pritschau, 69 Ohio St., 447: "It is due to differences in the character of the misconduct rather than to differences of opinion in reviewing courts that it has in some cases been held that the effect of the misconduct may be eliminated by instructions, and in others that it cannot be." When we consider, in the present case, that there was no direct evidence establishing the origin of this fire, and that upon the whole of the evidence adduced on the trial the question of defendant's negligence and consequent liability was at best a very close question of fact involved in much uncertainty and doubt, the harmful and extremely prejudicial effect of a statement by counsel to the jury, that soon after the fire the railroad company had offered to settle the loss, and that such offer had been renewed on the very day the trial commenced, becomes at once perfectly apparent. And the attempted withdrawal of these statements from the jury was, we think, wholly impotent to rid them of the mischievous inference that they were nevertheless true; and was utterly ineffectual to dislodge or remove from the minds of the jurors the harmful impression, which such statements were calculated, and obviously intended, to produce. No other rational conclusion can be reached in this case than that plaintiff's counsel by the making of such statements intended thereby and in that way to get before the jury a fact which he was not entitled to, and one which from considerations of public policy the law forbade should be mentioned on the trial; and this, for the sole and obvious purpose of inducing in the minds of the jury the impression or belief, that the railroad company in making such offer of settlement had, indirectly at least, confessed and admitted its liability. Manifestly this was the purpose of counsel's statements, and we think it impossible to say in this case that such was not their effect. While it should perhaps be said, that after objection made, court and counsel did all in their power to counteract and overcome the effect of these improper and prejudicial statements, yet the mischief had been done, the poison had been injected, and that which thereafter occurred was not, in our judgment, a sufficient antidote. It is the policy of the law to encourage the settlement of legal controversies, and hence it does not permit an offer of compromise to be

given in evidence as an acknowledgment or admission of the party making it, and this salutary rule, which is grounded upon considerations of public policy, just as imperatively forbids that the fact that such offer was made shall be mentioned or commented upon by counsel in argument to the jury, and when it is, unless it shall clearly appear from the record in the particular case that the verdict of the jury was not affected thereby, the misconduct is such as to require in the due administration of justice, that a new trial be granted therefor. The view that misconduct of counsel, such as is complained of in this case is sufficient to warrant and require the granting of a new trial unless it be made to appear that the verdict of the jury was not in any manner influenced thereby, is fully supported by the several cases cited in the brief of counsel for plaintiff in error, and by many others.

* * * * *

Judgments of the circuit court and of the court of common pleas reversed, and cause remanded to the latter court for a re-trial according to law.

SPEAR, DAVIS, SHAUCK and PRICE, JJ., concur.

FERTIG V. STATE.

Supreme Court of Wisconsin, 1898.

100 Wisconsin, 301.

MARSHALL, J. The errors assigned on behalf of plaintiff in error will be considered in their order and are as follows: * * * (2) permitting the prosecuting attorney to use improper language, detrimental to the accused, in closing his argument to the jury; * * *

* * * * *

2. The prosecuting attorney was permitted to say, in closing the case to the jury, replying to remarks of the attorney for the accused regarding the testimony of William Spaulding: "What would counsel have him do? Come here and shower bouquets on the assassin of his brother? Crown him with a wreath of laurels?" And also permit-

ting the district attorney to say, in substance, that there was murder in the heart of the accused as he proceeded to and effected the homicide,—that he had murder in his heart, in his eye, and in his brain; that he stood where the tracks indicated to get a good aim; the object of his vengeance was coming, sitting on the wood in full view; he (the accused) was a crack shot and knew it; he cocked his gun, drew the bead on the deceased, and the deed was done, and a son and brother was sent to his Maker without a moment's warning, by the act of an assassin,—as vile an act as ever happened on earth; so foul that it would be worthy of the vicegerent of the monarch of hell. That such language, with the earnestness with which we may well assume the words were uttered in the closing moments of an important trial, was highly calculated to carry the jury along the line of thought which it indicated, that is, that the accused was guilty, cannot be doubted; but whether it was outside the case, or tended unfairly to influence the jury, and to swerve them from the duty of deciding the case on the evidence, and that alone, in the light of the law governing the subject, is quite another question. So long as counsel did not depart from the evidence produced, but confined his argument to reasoning from that up to the conclusion that it established guilt, however eloquently and persuasively he may have handled his subject, it was not only legitimate but commendable. Within the record in this regard, the field is broad, and the license of the advocate, and duty as well, permits him to say with the utmost freedom what the evidence tends to prove, and that it convinces him, and should convince the jurors as well, of the fact in issue. As said in *People v. Hess*, 85 Mich. 128: "To deny to a prosecuting officer that privilege, would be to deny him the right to place before the jury the logic of the testimony which leads his mind to the inevitable conclusion of guilt, and which he has a right to presume will lead them to the same conclusion, if they view it as he does." That does not mean that a prosecuting officer may express his opinion independent of the evidence that the accused is guilty, or his opinion of guilt, which may or may not be based on the evidence, but that he may state from the record, upon which the issue is to be submitted to the jury, that it establishes guilt. To do the latter is but to state the evidence, draw inferences there-

from, and proceed, reasoning naturally from step to step up to the logical conclusion, and state it, all being legitimate parts of legitimate argument; and if the introduction and discussion lead to such conclusion, though stated with great earnestness and with strong feeling and conviction, so long as the advocate keeps within the record, the accused has no legitimate ground of complaint. That appears to be what was done in this case. There is nothing to indicate that the district attorney asserted that the accused was a murderer or assassin, except with reference to the offense for which he was being tried, and as he drew that conclusion from the evidence. It was the inevitable conclusion of the line of argument pursued by the prosecutor, from the evidence, and could not have been otherwise understood by the jury. It is quite unlike *Scott v. State*, 91 Wis. 552, where the district attorney spoke of the accused as a thief, not with reference to the offense for which he was on trial, but as a fact tending to establish guilt of that offense.

As to remarks made in reply to those of the attorney for plaintiff in error, regarding William Spaulding, it is sufficient to say that in using the term "assassin" it is quite clear that the district attorney was speaking from the evidence in the case as he viewed it, and that the jury must have so understood him. He had a right to assume that the evidence produced on the part of the state was true, and that it established what it tended to establish, and that it pointed most strongly to the guilt of the accused as charged. To address the jury accordingly can hardly be said to have been such an abuse of the privilege of counsel for the state, and so prejudicial to the accused, as to warrant a reversal of the judgment. True, harsh and violent language should not be used by counsel, certainly in criminal prosecutions, though whether language be harsh and abusive depends largely upon the evidence in the case, but in the absence of some manifest abuse of the privilege of legitimate argument, clearly working prejudice to the accused, it cannot be considered reversible error. In *Spahn v. People*, 137 Ill. 538, where the evidence on the part of the state established the guilt of the accused, the court held that, assuming the truthfulness of the people's evidence, which assumption the prosecuting attorney had a right to make on the argument, it was not such an abuse of the privilege of counsel in argu-

ment to the jury, to speak of the accused, with reference to the offense for which they were on trial as robbers and burglars, as to work a reversal on that ground. So we may say it was not an abuse of the rules of legitimate argument, in this case, to speak of the accused, from the evidence of the state, as a murderer.

* * * * *

By the court. * * * The judgment is affirmed.

GERMAN-AMERICAN INSURANCE COMPANY V. HARPER.

Supreme Court of Arkansas. 1902.

70 Arkansas, 305.

Wood, J. Appellees sued upon an insurance policy which contained this clause: "\$2,000 total concurrent insurance permitted, including this policy." Subsequent to the issuance of this policy, appellees took a policy in another company for \$2,000, which it was conceded avoided the policy sued on, unless the appellant had notice of the additional insurance before the loss, and failed to object to such insurance. Appellant conceded that if its local agent had notice of the additional insurance, and failed to object thereto, the forfeiture was waived. Appellant's local agent testified that he had no notice of the additional insurance before the loss. Witnesses for appellees testified that he had such notice. The issue was sharply drawn on this question of fact. Marshall, the witness upon whom appellant relied to establish the want of notice of the current insurance, resided and was the local agent at Fort Smith. The cause was being tried, on change of venue, at Greenwood. James Brizzolara, one of the attorneys for appellees, in the first or opening argument to the jury, used this language: "Gentlemen of the jury, if you knew Marshall's business methods, you would say, 'God save the plaintiffs, and God save all those who deal with him.'" Appellant objected to this remark of counsel, and the court said to the jury: "Col. Brizzolara's remark is entirely improper, and should not

have been made, and I now instruct you to pay no attention to it in making up your verdict, and it must not be considered by you, and give it no weight, but your duty is to consider the evidence admitted by the court in the progress of the trial." Col. Brizzolara was not a witness in the case. There was no evidence as to Marshall's business methods,—no impeachment of his business integrity or efficiency, nor of his moral character in the community where he lived.

* * * * *

The rule of procedure to which this court is committed is very well expressed in *Rudolph v. Landwerlen*, 92 Ind. 34, 40, where it is said: "Very many abuses in argument may be sufficiently corrected by the instructions of the court to the jury, and a large discretion as to the refusing of new trials because of such violations belongs to trial courts, and this court will not interfere because of an abuse in argument which was sufficiently counteracted by the action of the trial court in the premises; but it will interfere where, notwithstanding the efforts of the trial court to correct the abuse, the irregularity appears to be such as to prevent a fair trial, and the particular circumstances of each case will guide this court to its decision." In *Chicago, B. & Q. Ry. Co. v. Kellogg*, 76 N. W. Rep. 462, it is said: "If the transgression be flagrant,—if the offensive remark has stricken deep, and is of such a character that neither rebuke nor retraction can entirely destroy its sinister influence,—a new trial should be promptly awarded, regardless of the want of objection or exception." In the language of Judge Mulkey in *Quinn v. People*, 123 Ill. 333: "As well might one attempt to brush off with the hand a stain of ink from a piece of white linen" as to eradicate from the jury the impression that was created by the remarks of Col. Brizzolara. The appellant was wholly dependent upon the testimony of Marshall to sustain its contention. He testified that he had no knowledge and had not acquiesced in the additional insurance. In this statement he was in direct conflict with several witnesses for appellees, yet it was the jury's province to believe him in preference to all the rest. This the jurors would not likely have done, even without the derogatory statements of counsel. Still, they might have done so, and it is not for this court to say that they would not have given more weight to his evidence than the other witnesses,

had it not been for the improper remarks. These remarks were gravely prejudicial. True, they were not made under the sanction of an oath as a witness. But the statement of matters of fact by counsel of high character and excellent standing in the profession might be as readily accepted and believed by the jurors, and make as profound and ineradicable impression upon their minds, as if they had been uttered under oath. The remarks of the learned counsel, if not directly, certainly by insinuation conveyed to the jury a knowledge on his part of Marshall's business methods which were so inefficient or disreputable as to make him untrustworthy, and one whom all having business in his line should shun. The statement of counsel that an acquaintance with Marshall's business methods would make the jurors feel like imploring the Almighty to save plaintiffs and all who had dealings with him was well calculated to make the jury regard him as entirely unreliable, to say the least. We cannot see how it is possible for the jury not to have been prejudiced, notwithstanding all the commendable efforts of the presiding judge to prevent such result. The only cure for such prejudice is a new trial. For that purpose the judgment is reversed, and the cause remanded.

RIDDICK, J., dissenting.

MURPHY'S EXECUTOR V. HOAGLAND.

Court of Appeals of Kentucky. 1908.

32 Kentucky Law Reporter, 839.

Opinion of the court by Judge LASSING, reversing.

This is a contest over the will of John, commonly known as "Pat" Murphy. * * *

* * * * *

Appellant also complains of the misconduct of counsel for the contestants during the progress of the trial. During the course of the cross-examination of the witness, Margaret Devereaux, counsel for contestants asked this question: "Do you know how many of the jurors wanted to

break it," (referring to the will of John Murphy at the last trial thereof), and continued, "Don't you know, as a matter of fact, that eight stood for breaking the will?"

This question was at once objected to by counsel for the propounder and the objection was sustained. The learned counsel must have known that any question which referred to the result or the partial result of a former trial of the case was very improper, in fact inexcusable. Propounder's counsel could not permit the question to go unnoticed, and the very fact that he objected, but served to emphasize it's importance in the minds of the jurors. They may have, and doubtless did, attach much importance to the question which was asked and objected to by counsel for the propounder, and even though it was excluded by the court, the jurors, being sensible and intelligent men, could not rid their minds of the information which this question gave them, to-wit: That eight jurors had, on a previous trial, stood for breaking the will. They no doubt reasoned among themselves that had this not been true, the propounder would not have objected to its being asked, and, being taken as true, it was in fact stating to the jury that, while you are to try this case according to the evidence, we want you to know that, at least, eight jurors on a former trial believed that the will should not be permitted to stand.

In the case of the *Illinois Central Railroad Co. v. Jolly*, 27 Ky. Law Rep., 119, counsel, in closing his argument in the lower court, used this language: "That this action had been in the courts some four or five years, and that the railroad company was furnished with lawyers and stenographers for the purpose of catching at every little thing to take the case to the Court of Appeals again, in order to defeat the claim by reversing it, it having heretofore been reversed in the Court of Appeals on a technicality," and other similar statements. On appeal this court said: "When counsel, in the heat of argument, oversteps the bounds and objection is made by the opposing side, the court should exclude the improper matter. The remarks of appellee's counsel that this lady had obtained a judgment on the former trial; that it had been appealed from and reversed by this court upon a technicality, and that appellant was then preparing, with the assistance of skilled lawyers and stenographers, to appeal from any verdict

that might be rendered and obtain another reversal, were improper.”

And in the case of the *L., H. & St. L. Ry. Co. v. Morgan*, 23 Ky. Law Rep., 121, appellee's counsel had used this language: “The railroad can appeal this case, but the plaintiff, Morgan, is a poor man and has no money to appeal with, and will have to accept what you do, but the railroad has money to appeal this case, and it will do so.”

And this court, in passing upon that case on review here, said: “There is a latitude allowed in oral argument, but it should not extend as far as was done in the quotation.” In each of these cases above referred to the judgment was reversed because of improper argument and other errors.

* * * * *

For the reasons given the judgment is reversed and cause remanded, for further proceedings consistent with this opinion.

WILLIAMS V. BROOKLYN ELEVATED RAILROAD COMPANY.

Court of Appeals of New York. 1891.

126 New York, 96.

This action was brought to recover damages to plaintiff's premises in Brooklyn, caused by the erection and operation of defendant's elevated railroad upon the street in front of them.

* * * * *

ANDREWS, J.

* * *

* * * * *

The counsel for the plaintiff, in his address to the jury, after referring to “the utter disregard of the rights of the private citizens by corporations,” proceeded to read from a newspaper, “The New York Tribune,” an article headed “Only a Boy Peddler,” purporting to be an account of the death of a boy, “a little fellow fifteen years old, a Roumanian, a stranger in this great city (New York), selling collar buttons and pocket combs from a modest tray, to help sup-

port his mother and eight brothers and sisters," caused by his touching an electric wire which, the article stated, had been left swinging for months from a pole near which the boy had taken his stand. This was made by the writer the text for comment on the neglect of the city officials in failing to take effective measures to have electric wires placed under ground, and the article concluded with the statement: "It is shameful that where such perils are in question there should be procrastination, shiftlessness and incompetency which would not be tolerated in a private business."

When the counsel for the plaintiff commenced reading the article the defendant's counsel interposed and objected to the reading, and asked the court to prevent it. The court overruled the objection, and the defendant's counsel excepted. The plaintiff's counsel then resumed the reading, and was reminded by the court that the reading was under exception, but the counsel proceeded and read the remainder of the article.

It is the privilege of counsel in addressing a jury to comment upon every pertinent matter of fact bearing upon the questions which the jury have to decide. This privilege it is most important to preserve and it ought not to be narrowed by any close construction, but should be interpreted in the largest sense. The right of counsel to address the jury upon the facts is of public as well as private consequence, for its exercise has always proved one of the most effective aids in the ascertainment of truth by juries in courts of justice, and this concerns the very highest interest of the state. The jury system would fail much more frequently than it now does if freedom of advocacy should be unduly hampered and counsel should be prevented from exercising within the four corners of the evidence the widest latitude by way of comment, denunciation or appeal in advocating his cause. This privilege is not beyond regulation by the court. It is subject to be controlled by the trial judge in the exercise of a sound discretion, to prevent undue prolixity, waste of time, or unseemly criticism. The privilege of counsel, however, does not justify the introduction in his summing up of matters wholly immaterial and irrelevant to the matter to be decided, and which the jury have no right to consider in arriving at their

verdict. The jury are sworn to render their verdict upon the evidence. The law sedulously guards against the introduction of irrelevant or incompetent evidence, by which the rights of a party may be prejudiced. The purpose of these salutary rules might be defeated if jurors were allowed to consider facts not in evidence, and the privilege of counsel can never operate as a license to state to a jury facts not in evidence, or to present considerations which have no legitimate bearing upon the case and which the jury would have no right to consider. Where counsel in summing up proceeds to dilate upon facts not in evidence or to press upon the jury considerations which the jury would have no right to regard, it is, we conceive, the plain duty of the court, upon objection made, to interpose, and a refusal of the court to interpose, where otherwise the right of the party would be prejudiced, would be legal error. There are many cases sustaining this conclusion. Among them are *Mitchum v. State of Georgia* (11 Geo. 616); *Tucker v. Henniker* (41 N. H. 317); *Rolfe v. Rumford* (66 Me. 564).

The reading by counsel in summing up to the jury of the newspaper article "Only a Boy Peddler," was wholly irrelevant to the case. It could have been read for no purpose except to influence the jury against corporations and to lead them, under the influence of a just anger excited by the incident narrated, to give liberal damages to the plaintiff in the case on trial. The refusal of the court to interfere, under the circumstances of this case, was legal error. The privilege of counsel and the largest liberality in construing it did not authorize such a totally irrelevant and prejudicial proceeding. The counsel also, during the summing up, read a passage from the opinion of this court in the *Lahr* case (104 N. Y. 291), after objection taken by the defendant's counsel had been overruled by the court. It is not important to consider the exception to this ruling, as the appellant is entitled to a reversal for the reason already stated. It may be observed, however, that it is the function of the judge to instruct the jury upon the law, and where counsel undertake to read the law to the jury, the judge may properly interpose to prevent it; but if the judge sees fit to permit this to be done and the law is correctly laid down in the decision or book used by counsel, it would not, we think, constitute legal error or be ground of ex-

ception by the other party, although such a practice is not to be encouraged. If, however, the reading from a decision was to bring before the jury the facts of the case decided, or the amount of the verdict, or the comments of the judge on the facts, to influence the jury in deciding upon the facts in the case on trial, or in fixing the amount of damages, then clearly the reading ought not to be permitted.

We think the judgment in this case should be reversed upon the exception taken to the reading of the newspaper article.

Judgment reversed and new trial ordered.

All concur.

Judgment reversed.

WILKINSON V. PEOPLE.

Supreme Court of Illinois. 1907.

226 Illinois, 135.

MR. JUSTICE WILKIN delivered the opinion of the court:

* * * * *

It appears that an action on the case had been brought by one Rose Strang against the Lake Street Elevated Railroad Company for personal injuries, in which the defendant and others testified on behalf of the plaintiff. The suit resulted in a verdict in favor of the plaintiff. William Elmore Foster and Joseph B. David, who were attorneys for the railroad company, were engaged with one L. L. Austin, a claim agent, and Thomas McGuire, a detective, in endeavoring to obtain affidavits in support of a motion for a new trial, and claiming to have learned from the defendant that his testimony in the case was not true, after some preliminary conversations a meeting was arranged for the 22nd of April, 1904, in the office of Foster, at which Foster, McGuire, David, Miss Neville, (a stenographer,) and the defendant were present. Conversations then took place as to the testimony given by Wilkinson upon the trial of the personal injury case, at which time it is claimed the

writing set up in the indictment as an affidavit was read to the defendant. The defendant, together with Rose Strang and others, was subsequently indicted in the criminal court of Cook county for having conspired to extort money from the said elevated railroad company, upon the trial of which it is charged the defendant committed the perjury attempted to be assigned.

As above stated, Joseph B. David was one of the attorneys for the elevated railroad company in the personal injury case and testified on behalf of the People in this case. He swears he was also special counsel for the People in the trial of the conspiracy case, and appears prominently in the argument of this case * * *

* * * * *

It is insisted that the judgment below should be reversed because one of the attorneys who appears as counsel for the People and argued the case orally in this court was a leading and material witness on behalf of the prosecution in the court below. In justification of his conduct it is insisted that there is no law in this State, statutory or otherwise, forbidding an attorney to be a witness and at the same time an attorney in a case. Doubtless that is true; but courts have generally condemned the practice as one which should be discountenanced and of doubtful professional propriety. We said, speaking by Justice Breese, in *Morgan v. Roberts*, 38 Ill. 65, on page 85: "We are not advised that it is contrary to any statute or to any maxim of the common law to make the attorney in a cause a witness in the cause he is managing. This is a matter which appeals to the professional pride of an attorney and his sense of his true position and duty. In the English courts, in several cases, it was held that an attorney cannot appear in the same cause in the double capacity of witness and advocate, and it has been so ruled in Pennsylvania and in Iowa, on the circuit. In Indiana it was held by Judge McDonald, now United States district judge, that an attorney in a cause could not be permitted to testify to the general merits of the case. In *Frear v. Drinker*, 8 Pa. St. Rep. 521, the court said that it was a highly indecent practice for an attorney to cross-examine witnesses, address the jury and give evidence himself to contradict the witness: that it was a practice to be discountenanced by court and

counsel; that it was sometimes indispensable that an attorney, to prevent injustice, should give evidence for his client. It, however, leads to abuse. But at the same time there was no law to prevent it. All the court can do is to discountenance the practice, and, when the evidence is indispensable, to recommend to the counsel to withdraw from the cause. This subject has engaged the attention of other courts and of this court, and however indecent it may be in practice for an attorney retained in a case and managing it, to be a witness also, we cannot say he is incompetent, and must leave him to his own convictions of what is right and proper under such circumstances." And again, in *Ross v. Demoss*, 45 Ill. 447, Justice Lawrence said: "On the trial below the evidence was conflicting, but it seems to preponderate in favor of the decree. The weight of the evidence of Garner is somewhat impaired from the fact that he was proved to have been one of the attorneys in the case, and had a conditional fee, dependent on the result of the suit. It is of doubtful professional propriety for an attorney to become a witness for his client without first entirely withdrawing from any further connection with the case, and an attorney occupying the attitude of both witness and attorney for his client subjects his testimony to criticism, if not suspicion; but where the half of a valuable farm depends upon his evidence he places himself in an unprofessional position and must not be surprised if his evidence is impaired. While the profession is an honorable one, its members should not forget that even they may so act as to lose public confidence and general respect."

The foregoing language of eminent judges of this court was used in civil cases and is peculiarly applicable to this case, in which the People are generally understood to be represented by public officers. Here the witness first appeared as an attorney for the Lake Street Elevated Railroad Company in the personal injury case, and was prominent in procuring affidavits in support of the motion for a new trial, and one of which he attempted to obtain from the defendant, Wilkinson. He next appeared, he says, as special counsel for the People in the prosecution of the conspiracy case, and while he may not have actively appeared in the prosecution of this case on the trial below, it is quite apparent that he had more or less to do with shap-

ing the course of the prosecution, and voluntarily, as we have already said, appeared as a prominent witness in the case. There is substantial ground for the inference that he regarded the litigation throughout as between the elevated railroad company and the defendant or defendants, rather than as by the People for the enforcement of public rights. The fact that he does appear in this record in the unenviable attitude of a willing witness and a zealous attorney should not, perhaps, work a reversal of the judgment below if the record were in all other respects free from error, but we cannot overlook such professional impropriety when our attention is called to it.

Other grounds of reversal urged have received consideration, but we think they are without substantial merit.

For the errors indicated the judgment below will be reversed.

Judgment reversed.

MR. JUSTICE CARTER, dissenting.

CAMPBELL V. MAHER.

Supreme Court of Indiana. 1885.

105 Indiana, 383.

ELLIOTT, J.

In the course of his argument to the jury the counsel for the appellee said: "The record in this case shows that the plaintiff was not willing to try this case at his home in Daviess county, among his neighbors, but has brought the case to Pike county on a change of venue, among strangers." The appellant objected, and the court, as the record recites, "remarked that it was not improper for counsel to refer to matters which were disclosed by the record, since the whole record was before the jury, but that the argument of counsel had gone too far, and should be limited to the record." What followed is thus exhibited in the record: "And thereupon counsel for the plaintiff resumed his seat, and the counsel for the defendant again turned to the jury, and, resuming his argument, said: 'The court says I may

refer to the record. Gentlemen, the record of this case shows that the cause was brought from Daviess county to this county on the motion of the plaintiff.' To which statement the plaintiff's counsel again objected, and again assigned in support of his objection the reasons assigned by him in support of the objection to argument of defendant's counsel herein above set out, but the court overruled said objection, to which the plaintiff's counsel excepted, whereupon the defendant's counsel again turned to the jury and said: 'Gentlemen of the jury, I have only stated to you what the record in this cause shows to be true, and the court has decided that I have a right to do this.' "

The trial court was unquestionably wrong in ruling that everything that appears in the record is the subject of argument to the jury, for there are many things which the record discloses that the jury have no right to consider. Juries, as every one knows, are sworn to try the case "according to the law and the evidence," and an argument must be confined to the evidence and the law. Where a party secures a legal right according to law, the fact that he has secured it can not be used to his prejudice. A change of venue is a legal right, and where it is awarded by the court in conformity to law, it can not be used to the prejudice of the party by whom it was obtained, nor can it be commented on in argument. It would be a perversion of law to permit the exercise of a legal right, under the order of the court, to be made the subject of consideration by a jury. We need not, however, discuss this question further for it is settled against the appellee by authority. *Farman v. Lauman*, 73 Ind. 568.

The comments of counsel were not mere general, fugitive statements, but they were reiterated, and they were also sanctioned by the ruling of the court, so that there was a deliberate and emphatic presentation of an improper subject to the jury, and unless we can ascertain from the record that no harm resulted, we must reverse. The record does not enable us to declare that the appellant was not injured, for the case is a close one upon the evidence, and we can not say that the misconduct of the appellee's counsel did the appellant no injury. There are cases where a reversal will not be adjudged, although there is some misconduct in argument. *Shular v. State*, ante, p. 289, and authorities cited;

“Misconduct of Counsel in Argument,” 14 Cent. L. J. 406.
This is not such a case.

Judgment reversed.

HANSELL-ELCOCK FOUNDRY COMPANY V. CLARK.

Supreme Court of Illinois. 1905.

214 Illinois, 399.

MR. CHIEF JUSTICE RICKS delivered the opinion of the court:

This is an appeal from a judgment of the Appellate Court for the First District affirming a judgment of the superior court of Cook county for \$8,000 in favor of appellee, against appellant, for damages for personal injuries sustained by the appellee while in appellant's employ. Appellee, at the time of the injury, July 16, 1901, was a structural iron worker in appellant's service, engaged in the construction of the St. Cecilia school building,—a three-story structure in the city of Chicago,—and while so engaged was struck by a large iron beam, sustaining the injuries for which this suit was brought.

* * * * *

The court limited the time of the argument to forty-five minutes for each side, but extended the time seven minutes for defendant's counsel, at their request, but refused to grant further extension although requested so to do, and this refusal of the court is also assigned as error. It is earnestly insisted by counsel for appellant that because of this limitation they were unduly hampered in the presentation of the case to the jury. We have always held this question to be one within the sound discretion of the trial court, but that where it appears that the discretion has manifestly been abused this court would reverse the case for such error. In cases of this character each side should have ample time to present its case to the jury and to thoroughly argue the facts. The bare possibility of compromising the rights of either the plaintiff or defendant because of not allowing counsel ample time in which to present a client's cause should be carefully guarded against. Under

our system of jurisprudence the power of the jury is so great, trial courts should be liberal in their allowance to counsel of time in which to review and argue the evidence. The trial court, however, who hears the case is in a far better position to judge as to the time proper to be given counsel for argument than can be a court of review, and we are not disposed to reverse a case, for the reason alone, that the time allowed counsel for argument was too short, unless we are thoroughly satisfied the complaining party has in fact been wronged by an undue limitation. In this case we think the trial court might very properly have granted counsel more time for argument, but we do not think we would be justified in reversing the case on the simple ground that the limitation was unjust. But seven witnesses testified for appellee and nine for appellant. The record shows that the examination of the witnesses began on the 17th of March, 1903, and that upon the convening of the court on the 19th the verdict of the jury was returned. But five witnesses on each side testified as to the condition and scene of the accident. We cannot say from a review of the evidence that the time allotted counsel for argument was manifestly too short.

* * * * *

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

CHAPTER XIII.

SPECIAL INTERROGATORIES.

SECTION 1. PURPOSE, SCOPE AND EFFECT.

CHICAGO AND NORTHWESTERN RAILWAY COMPANY V. DUNLEAVY.

Supreme Court of Illinois. 1889.

129 Illinois, 132.

MR. JUSTICE BAILEY delivered the opinion of the Court:

This was an action on the case, brought by Annie Dunleavy, administratrix of the estate of John Dunleavy, deceased, against the Chicago and Northwestern Railway Company, to recover damages under the statute for the death of the plaintiff's intestate. The declaration consisted of nine counts, to the fifth, sixth and seventh of which a demurrer was sustained. To the remaining counts the defendant pleaded not guilty, and on trial before the court and a jury, the issues were found for the plaintiff and her damages assessed at \$1800, and for that sum and costs, the court, after denying the defendant's motion for a new trial, gave judgment for the plaintiff. Said judgment was affirmed by the Appellate Court on appeal, and by a further appeal the record is now brought to this court.

The first count of the declaration alleges that the defendant, on the 26th day of July, 1886, by its servants, ran one of its locomotive engines with a train of freight cars thereto attached, from east to west over one of its tracks under a viaduct at Blue Island avenue, in the city of Chicago; that the plaintiff's intestate was then and there in the employ of said city cleaning and painting the iron columns, etc., of said viaduct, and that "the said train was, by and through the negligence, carelessness and improper conduct of the said defendant, through its servants in the premises, run at a high and dangerous rate of speed," and that while being so run, it was driven against and upon said Dun-

leavy, whereby he was instantly killed. The second count alleges that the defendant, through its servants, "so carelessly, improperly and unskillfully managed and conducted said engine and train, that the said John Dunleavy was forcibly knocked down by said engine and train" and thrown under the wheels of the train and instantly killed. The third count sets up an ordinance of said city requiring the bell of each locomotive engine to be rung continually while running within the city, and alleging that the defendant's servants in charge of said train failed to comply with said ordinance, and that in consequence of such failure said Dunleavy was killed. The fourth count is substantially like the second. The eighth count alleges that the engineer and fireman could, by looking, have seen Dunleavy standing at his work, and by sounding a whistle have given him notice of the approach of a train, but that they failed to sound the whistle, and that in consequence of such failure said Dunleavy was killed. The ninth count alleges substantially the same act of negligence as the eighth, though in different language. Each count alleges in proper form that Dunleavy at the time he was killed, was in the exercise of due care.

At the close of the trial the counsel for the defendant asked the court to instruct the jury that the evidence in the case was insufficient to sustain a verdict for the plaintiff, and that their verdict should therefore be for the defendant. This instruction the court refused to give, and such refusal is assigned for error.

* * * * *

The next questions to be considered are those which relate to the special findings of the jury. Upon this branch of the case it is urged, first, that the court improperly refused to submit certain questions of fact to the jury; second, that certain of the questions of fact submitted were not properly answered; and third, that the special findings of fact are inconsistent with the general verdict. The statute under which special findings may be required is but recent, and the rules of practice thereby established have never before been presented to this court for its consideration. We must therefore look mainly to the statute itself for our guide in determining the propositions now raised. The statute is as follows:

Section 1. "That in all trials by jury in civil proceedings in this State in courts of record, the jury may render, in their discretion, either a general or a special verdict; and in any case in which they render a general verdict, they may be required by the court, and must be so required on request of any party to the action, to find specially upon any material question or questions of fact which shall be stated to them in writing, which questions of fact shall be submitted by the party requesting the same to the adverse party before the commencement of the argument to the jury.

Sec. 2. "Submitting or refusing to submit a question of fact to the jury when requested by a party as provided by the first section hereof may be excepted to and be reviewed on appeal or writ of error as a ruling on a question of law.

Sec. 3. "When the special finding of fact is inconsistent with the general verdict, the former shall control the latter and the court may render judgment accordingly."

This statute, so far as it relates to special verdicts, is merely declaratory of the common law. It has been competent for juries at common law, since the statute of 13 Edward 1, to find a general verdict, or when they have any doubt as to the law, to find a special verdict, and refer the law arising thereon to the decision of the court. By a special verdict, the jury, instead of finding for either party, find and state all the facts at issue, and conclude conditionally, that if upon the whole matter thus found, the court should be of the opinion that the plaintiff has a good cause of action, they then find for the plaintiff, and assess his damages; if otherwise, then for the defendant. 2 Tidd's Practice, (Am. ed.) 897, and note.

The rules of law as to special verdicts and their requisites have long been settled both in this country and in England. Thus, it is held that they should find facts, and not the mere evidence of facts, so as to leave nothing for the court to determine except questions of law. *Vincent v. Morrison*, Breese, 227; *Brown v. Ralson*, 4 Rand. 504; *Seward v. Jackson*, 8 Cow. 406; *Henderson v. Allens*, 1 Hen & Mun. 235; *Hill v. Covell*, 1 N. Y. 522; *Langley v. Warren*, 3 id. 327; *Kinsley v. Coyle*, 58 Pa. St. 461; *Thompson v. Farr*, 1 Spears, 93; *Leach v. Church*, 10 Ohio St. 149; *LaFrombios v. Jackson*, 8 Cow. 589. To authorize a judgment upon a

special verdict, all the facts essential to the right of the party in whose favor the judgment is to be rendered, must be found by the jury; finding sufficient evidence, *prima facie*, to establish such facts, is not sufficient. *Blake v. Davis*, 20 Ohio, 231; *Hambleton v. Dempsey*, id. 168. If probative facts are found from which the court can declare that the ultimate facts necessarily result, the finding is sufficient. *Alhambra Addition Water Co. v. Richardson*, 72 Cal. 598; *Coveny v. Hale*, 49 id. 552. A special verdict cannot be aided by intendment, and therefore any fact not ascertained by it will be presumed not to exist. *Lee v. Campbell*, 4 Porter, 198; *Zumull v. Watson*, 2 Munf. 283; *Lawrence v. Beaubun*, 2 Bailey, 625.

It is manifest of course that a special finding by a jury upon material questions of fact submitted to them under the provisions of the statute is not a special verdict, but an essentially different proceeding. A special verdict cannot be found where there is a general verdict, but the special findings of fact provided for by the statute can be required only in case a general verdict is rendered. But while this is so, much light in relation to special findings upon questions of fact, and their office and objects may be derived from the rules applicable to special verdicts. Both forms of verdict are provided for by the same statute, and they must therefore be construed as being *in pari materia*.

In giving construction to the statute, the first, and perhaps the most important question, relates to the scope and meaning of the phrase, "material question or questions of fact." May such questions relate to mere evidentiary facts, or should they be restricted to those ultimate facts upon which the rights of the parties directly depend? Evidently the latter: Not only does this conclusion follow from analogy to the rules relating to special verdicts, but it arises from the very nature of the case. It would clearly be of no avail to require the jury to find mere matters of evidence, because, after being found, they would in no way aid the court in determining what judgment to render. Doubtless a probative fact from which the ultimate fact necessarily results would be material, for there the court could infer such ultimate fact as a matter of law. But where the probative fact is merely *prima facie* evidence of the fact to be proved, the proper deductions to be drawn

from the probative fact presents a question of fact and not of law, requiring further action by the jury, and it cannot therefore be made the basis of any action by the court. Requiring the jury to find such probative fact is merely requiring them to find the evidence and not the facts, and results in nothing which can be of the slightest assistance to the parties or the court in arriving at the proper determination of the suit.

The view we take is strongly fortified by the provision of the third section of the statute, that, when a special finding of fact is inconsistent with the general verdict, the former shall control. This necessarily implies that the fact to be submitted shall be one which, if found, may in its nature be controlling. That can never be the case with a mere evidentiary fact. A fact which merely *tends* to prove a fact in issue without actually proving it, can not be said to be, in any legal sense, inconsistent with a general verdict, whatever that verdict may be. Such inconsistency can arise only where the fact found is an ultimate fact, or one from which the existence or non-existence of such ultimate fact necessarily follows, and that is never the case with that which is only *prima facie* evidence of the fact sought to be proved.

The common law requires that verdicts shall be the declaration of the unanimous judgment of the twelve jurors. Upon all matters which they are required to find they must be agreed. But it has never been held that they must all reach their conclusions in the same way and by the same method of reasoning. To require unanimity not only in their conclusions but in the mode by which those conclusions are arrived at would in most cases involve an impossibility. To require unanimity therefore, not only in the result but also in each of the successive steps leading to such result, would be practically destructive of the entire system of jury trials. To illustrate, suppose a plaintiff trying his suit before twelve jurors, should seek to prove a fact alleged in his declaration by giving evidence of twelve other facts, each having an independent tendency to prove the fact alleged. The evidence of each probative fact, or the conclusions to be drawn from it, might appeal with peculiar force to the belief or judgment of some one of the jurors, but less so to his fellows. The cumulative effect of all the

evidence might be such as to leave no doubt in the mind of any member of the panel as to the truth of the fact alleged, still, if the jury were required to find specially as to each probative fact, no one of the twelve facts would be at all likely to meet with the unanimous concurrence of the entire jury. As to each they would be compelled to confess their inability to agree, or what would be its equivalent, say they did not know or could not tell, which, if we apply the rules governing special verdicts, would be tantamount to a finding that the fact was not proved or did not exist. If such finding should be required, and should be given the effect of controlling the general verdict, the result would be, that under such system of trial, general verdicts could but seldom stand.

However natural the curiosity parties may have to know the precise course of reasoning by which jurors may arrive at verdicts either for or against them, they have no right, under guise of submitting questions of fact to be found specially by the jury, to require them to give their views upon each item of evidence, and thus practically subject them to a cross-examination as to the entire case. Such practice would subserve no useful purpose, and would only tend to embarrass and obstruct the administration of justice; and we may further say that such practice finds no warrant in our statute.

We are referred to one case in another State, where, in a suit for personal injuries against a railroad company, the defendant was permitted under a statute somewhat similar to ours, to put to the jury no less than one hundred and thirty-six interrogatories as to the facts, covering, apparently every possible phase of the evidence. The judgment against the railroad company was reversed for an erroneous instruction to the jury as to the form to their answer to questions where the evidence was not sufficient, but no suggestions seems to have been made that any portion of the questions put to the jury were improper. Whatever may be the view of such practice taken by the courts of other States, we are unwilling to give our countenance to its adoption here.

In the present case the defendant's counsel prepared and submitted fifteen questions of fact upon which the court was asked to require the jury to make special findings. Of these

the eleventh and twelfth were refused. The first was modified and submitted to the jury in its modified form. The residue of the questions were submitted as asked. We do not understand that the defendant is now complaining of the action of the court in relation to its eleventh and twelfth questions of fact. The first, as prepared by the defendant's counsel, was as follows:

1. "What precaution did the deceased take to inform himself of the approach of the train which caused the injury?"

This was modified by the court so as to read as follows:

1. "Was the deceased exercising reasonable care for his own safety at the time he was killed?"

The ultimate fact which it was incumbent upon the plaintiff to prove, and which the defendant sought to disprove, was that the deceased, at the time he was killed, was in the exercise of due care. That was one of the issues made by the pleadings, and it was one of the ultimate facts upon which the plaintiff's right to recover necessarily depended. What the deceased did to inform himself of the approach of the train was material only as tending to show reasonable care on his part or the want of it. His acts in that behalf, then, whatever they may have been, were facts which were merely evidential in their nature, and while they doubtless would have had a tendency to prove reasonable care or the contrary, there were none of them, so far as the evidence shows, which would have been conclusive of that question. The question then, as submitted by the defendant's counsel, sought to obtain a finding as to mere probative facts, and the court therefore properly refused to require the jury to answer it. The question substituted by the court submitted to the jury a material and controlling fact, and one which could be properly made the subject of a special finding.

Complaint is made to the answers given by the jury to the fourth and fifth questions. Those questions were as follows:

4. "Did the deceased look to ascertain if the train in question was approaching?"

5. "Did the deceased listen to ascertain if said train was approaching?"

To both of those questions the jury answered: "Don't

know." It is perhaps questionable whether the defendant, in order to avail itself of the objection that no proper answer was made to these questions, should not have made it at the time the verdict was returned and before the jury were discharged, for then the jury might have been required to complete their verdict by making proper answers. *Moss v. Priest*, 19 Abb. Prac. 314. But however that may be, it is manifest that the error, if it be one, cannot have been prejudicial to the defendant unless it can be seen that answers to said questions most favorable to the defendant, which of course would have been answers in the negative, would have constituted a finding inconsistent with the general verdict.

If then we treat said questions as having been answered in the negative, would such answers, either alone or in connection with the answers to the other questions, have constituted a finding necessarily inconsistent with the general verdict? To the second question, viz., "If the deceased had looked before the accident, could he have discovered the approach of the train in time to have avoided the accident?" the jury answered, "Yes," and to the third question, viz., "If the deceased had listened before the approach of said train, could he have discovered the approach of the train in time to have avoided the accident?" they answered, "If he had concentrated his attention in that particular direction, yes." The first question, viz., "Was the deceased exercising reasonable care for his safety at the time he was killed?" was also answered, "Yes."

The question then presents itself, whether, if it be admitted that the deceased neither looked or listened for the train, and also that if he had looked he could have seen it, and if he had listened with his attention concentrated in that direction, he could have heard it in time to avoid the accident, such facts would constitute such conclusive proof of contributory negligence on the part of the deceased as would have barred a recovery. Undoubtedly a failure to look or listen, especially where it affirmatively appears that looking or listening might have enabled the party exposed to injury to see the train and thus avoid being injured, is evidence tending to show negligence. But they are not conclusive evidence, so that a charge of negligence can be predicated upon them as a matter of law. There may be

various modifying circumstances excusing the party from looking or listening, and that being the case, a mere failure to look or listen cannot, as a legal conclusion, be pronounced negligence *per se*.

In determining whether the special findings are inconsistent with the general verdict so that the latter must be held to be controlled by the former, this court cannot look at the evidence. All reasonable presumptions will be entertained in favor of the verdict, while nothing will be presumed in aid of the special findings of fact. The inconsistency must be irreconcilable, so as to be incapable of being removed by any evidence admissible under the issues. *Pennsylvania Co. v. Smith*, 98 Ind. 42; *McComas v. Haas*, 107 id. 512; *Redelsheimer v. Miller*, id. 485. Under these principles it must be held that there is no necessary or irreconcilable inconsistency between the special findings and the general verdict, especially in view of the fact that the jury, notwithstanding their finding that the deceased did not look or listen, also found that he was in the exercise of reasonable care.

* * * * *

We are of the opinion that the record contains no material error, and the judgment of the Appellate Court will therefore be affirmed.

*Judgment affirmed.*¹

¹ Clementson, in his work on Special Verdicts and Findings, ingeniously observes:—"The submission of interrogatories under the statute is a sort of 'exploratory opening' into the abdominal cavity of the general verdict (if I may be pardoned a surgical metaphor) by which the court determines whether the organs are sound and in place and the proper treatment to be pursued." Page 45.

SECTION 2. CONSTITUTIONALITY.

WALKER V. NEW MEXICO AND SOUTHERN PACIFIC RAILROAD COMPANY.

*Supreme Court of the United States. 1897.**165 United States, 593.*

MR. JUSTICE BREWER delivered the opinion of the court.

The testimony was not preserved, and the case is submitted to us upon the pleadings, the verdict, the special findings of fact and the judgment; and on the record as thus presented plaintiff in error rests her claim of reversal upon three propositions: First, that the act of the territorial legislature, authorizing special findings of fact and providing for judgment on the special findings, if inconsistent with the general verdict (Laws of New Mexico 1889, c. 45, page 97), is in contravention of the Seventh Amendment to the Constitution of the United States, which reads:

“In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.”

* * * * *

First, with regard to the constitutional question, the specific objection is thus stated in the brief:

“It is not contended, although the English authorities would appear to warrant the contention, that at the common law the judge might not require the jury to answer special questions, or interrogate the jury as to the grounds upon which their general verdict was found; but it is most earnestly contended that the extent of the power of the judge, if in his opinion the special findings or answers of the jury to interrogatories were inconsistent with the general verdict, was to set aside the general verdict and award a *venire de novo*, while under this statute authority is attempted to be conferred upon the judge to render final judgment upon the special findings.”

We deem it unnecessary to consider the contention of defendant in error that the territorial courts are not courts

of the United States, and that the Seventh Amendment is not operative in the Territories, for by the act of April 7, 1874, c. 80, 18 Stat. 27, Congress, legislating for all the Territories, declared that no party "shall be deprived of the right of trial by jury in cases cognizable at common law;" and while this may not in terms extend all the provisions of the Seventh Amendment to the Territories, it does secure all the rights of trial by jury as they existed at common law.

The question is whether this act of the territorial legislature in substance impairs the right of trial by jury. The Seventh Amendment, indeed, does not attempt to regulate matters of pleading or practice, or to determine in what way issues shall be framed by which questions of fact are to be submitted to a jury. Its aim is not to preserve mere matters of form and procedure but substance of right. This requires that questions of fact in common law actions shall be settled by a jury, and that the court shall not assume directly or indirectly to take from the jury or to itself such prerogative. So long as this substance of right is preserved the procedure by which this result shall be reached is wholly within the discretion of the legislature, and the courts may not set aside any legislative provision in this respect because the form of action—the mere manner in which questions are submitted—is different from that which obtained at the common law.

Now a general verdict embodies both the law and the facts. The jury, taking the law as given by the court, apply that law to the facts as they find them to be and express their conclusions in the verdict. The power of the court to grant a new trial if in its judgment the jury have misinterpreted the instructions as to the rules of law or misapplied them is unquestioned, as also when it appears that there was no real evidence in support of any essential fact. These things obtained at the common law; they do not trespass upon the prerogative of the jury to determine all questions of fact, and no one to-day doubts that such is the legitimate duty and function of the court, notwithstanding the terms of the constitutional guarantee of right of trial by jury. Beyond this, it was not infrequent to ask from the jury a special rather than general verdict, that is, instead of a verdict for or against the plaintiff or defendant

embodying in a single declaration the whole conclusion of the trial, one which found specially upon the various facts in issue, leaving to the court the subsequent duty of determining upon such facts the relief which the law awarded to the respective parties.

It was also a common practice when no special verdict was demanded and when only a general verdict was returned to interrogate the jury upon special matters of fact. Whether or no a jury was compelled to answer such interrogations, or whether, if it refused or failed to answer, the general verdict would stand or not, may be questioned. *Mayor &c v. Clark*, 3 Ad. & Ell. 506. But the right to propound such interrogatories was undoubted and often recognized. *Walker v. Bailey*, 65 Maine, 354; *Spurr v. Shelburne*, 131 Mass. 429. In the latter case the court said (page 430): "It is within the discretion of the presiding justice to put inquiries to the jury as to the grounds upon which they found their verdict, and the answers of the foreman, assented to by his fellows, may be made a part of the record, and will have the effect of special findings of the facts stated by him. And no exception lies to the exercise of this discretion. *Dorr v. Fenno*, 12 Pick. 521; *Spoor v. Spooner*, 12 Met. 281; *Mair v. Basset*, 117 Mass. 356; *Lawler v. Earle*, 5 Allen, 22." So that the putting of special interrogatories to a jury and asking for specific responses thereto in addition to a general verdict is not a thing unknown to the common law, and has been recognized independently of any statute. Beyond this we cannot shut our eyes to the fact that in many States in the Union, in whose constitutions is found in the most emphatic language as assertion of the inviolability of trial by jury, are statutes similar to the one enacted by the territorial legislature of New Mexico; that those statutes have been uniformly recognized as valid, and that a large amount of the litigation in the courts is carried through in obedience to the provisions of such statutes. It would certainly startle the profession to be told that such statutes contravene a constitutional requirement of the inviolability of jury trials.

Indeed, the very argument of counsel for plaintiff in error is an admission that up to a certain extent those statutes are undoubtedly valid. That argument is practically that when the specific findings are returned and found to be

conflicting with the general verdict the court is authorized to grant a new trial, but can do no more. But why should the power of the court be thus limited? If the facts as specially found compel a judgment in one way, why should not the court be permitted to apply the law to the facts as thus found? It certainly does so when a special verdict is returned. When a general verdict is returned and the court determines that the jury have either misinterpreted or misapplied the law the only remedy is the award of a new trial, because the constitutional provision forbids it to find the facts. But when the facts are found and it is obvious from the inconsistency between the facts as found and the general verdict that, in the latter, the jury have misinterpreted or misapplied the law, what constitutional mandate requires that all should be set aside and a new inquiry made of another jury? Of what significance is a question as to a specific fact? Of what avail are special interrogatories and special findings thereon if all that is to result therefrom is a new trial, which the court might grant if it were of opinion that the general verdict contained a wrong interpretation or application of the rules of law? Indeed, the very thought and value of special interrogatories is to avoid the necessity of setting aside a verdict and a new trial—to end the controversy so far as the trial court is concerned upon that single response from the jury.

We are clearly of opinion that this territorial statute does not infringe any constitutional provision, and that it is within the power of the legislature of a Territory to provide that on a trial of a common law action the court may, in addition to the general verdict, require specific answers to special interrogatories; and, when a conflict is found between the two, render such judgment as the answers to the special questions compel.

* * * * *

These are all the questions in the case, and, finding no error in the record, the judgment is

Affirmed.

SECTION 3. ARGUMENT AND INSTRUCTIONS AS TO PROPER ANSWERS.

RYAN V. ROCKFORD INSURANCE COMPANY.

Supreme Court of Wisconsin. 1890.

77 Wisconsin, 611.

CASSODAY, J. The learned counsel for the defendant strenuously contends that the evidence is insufficient to support the general verdict or any of the special findings in favor of the plaintiff. The view we have taken of the case renders it unnecessary for us to determine that question.

The statute requires the court to direct the jury to find a special verdict when requested as prescribed. Sec. 2858, R. S. Such verdict must "be prepared by the court in the form of questions in writing, relating only to material issues of fact and admitting a direct answer, to which the jury shall make answer in writing. The court may also direct the jury, if they render a general verdict, to find in writing upon any particular question of fact *to be stated as aforesaid.*" *Ibid.* This last provision is applicable to the case at bar. The purpose of thus submitting particular controverted questions of fact is to secure a direct answer free from any bias or prejudice in favor of or against either party. It is a wise provision in certain cases when properly administered. It has often been demonstrated in the trial of causes that the non-expert jurymen are more liable than the experienced lawyer or judge to be led away from the material issues of fact involved by some collateral circumstance of little or no significance, or by sympathy, bias, or prejudice; and hence it is common practice for courts, in the submission of such particular questions and special verdicts, to charge the jury, in effect, that they have nothing to do with, and must not consider the effect which their answers may have upon, the controversy, or the parties. The learned trial judge, when in health, has frequently so charged. It is certainly a very proper thing to do when the business or reputation of either party is such as to naturally stimulate a bias in favor of the one party or the other. It is true that juries, under such a charge,

sometimes return inconsistent answers; but it is usually because such is the honest result of their unbiased judgment upon different branches of the evidence.

In the case at bar the learned trial judge seems to have been particularly anxious to prevent such inconsistent answers; and hence he explained to the jury what different answers to each particular question so submitted would be consistent, and what inconsistent, with a general verdict in favor of one or the other party. This was peculiarly calculated to secure special answers which would be consistent with a general verdict rather than in accordance with the weight of evidence upon each of such particular questions. The effect of such instructions was very much the same as though the court had charged the jury that after they had determined upon a general verdict then they should answer the particular questions submitted in the way they had thus been informed would be consistent with such general verdict. This was misleading, and well calculated to defeat the very object of the statute in authorizing such submission.

* * * * *

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

CHICAGO & ALTON RAILROAD COMPANY V. GORE.

Supreme Court of Illinois. 1903.

202 Illinois, 188.

MR. JUSTICE BOGGS delivered the opinion of the court.

* * * * *

We do not conceive that it was improper practice to permit counsel for appellee to read the special interrogatories to the jury, and in connection therewith discuss the evidence, for the purpose of convincing the jury that under the evidence the interrogatories should be answered in the affirmative or in the negative, as the case might be. The objection is not that the argument of counsel appealed to the prejudice of the jurors or to their sympathies, or that it

transcended legitimate grounds of debate, but simply that it was error to allow counsel to read the interrogatories to the jury and discuss the evidence which bore upon the answers which counsel conceived should be made by the jury thereto. The statute which authorizes the submission of special questions of fact to be answered by a jury requires that such questions shall be stated to the jury in writing, and "shall be submitted by the party requesting the same, to the adverse party before the commencement of the argument to the jury." The end designed to be attained by the argument of counsel is to lead the jury to the proper decision of or answer to the issues made by the pleadings. It was entirely legitimate for counsel to review the evidence and suggest to the jury what, under the proof, their general verdict should be, and none the less to suggest the answers which, in the view of counsel, the evidence demanded should be returned to the special interrogatories. In *Timins v. Chicago, etc., Railroad Co.*, 72 Iowa, 94, it was said: "It is competent for an attorney to read special interrogatories to the jury, and to discuss the evidence applicable thereto, and to suggest the answers which in his judgment ought to be rendered."

* * * * *

The judgment of the Appellate Court must be and is affirmed.

Judgment affirmed.

CAPITAL CITY BANK V. WAKEFIELD.

Supreme Court of Iowa. 1891.

83 Iowa. 46.

GIVEN, J. * * * * *

IV. At the conclusion of the instructions the court submitted the three special interrogatories, with this instruction. "You will decide upon them in the same manner as your general verdict, and answer the same. You will be careful, however, that these answers are in harmony with and support your general verdict." The appellant con-

tends that this instruction "requires the jury to answer the interrogatories, not with reference to the facts of the case as shown by the evidence, but with reference to their general verdict only." That the findings and verdict should be in harmony is not questioned, nor that the court may instruct the jury to exercise care in that respect. Special findings are of ultimate material facts only, and, when found, the result—the general verdict—follows therefrom. It is clear that a jury should first decide from the evidence what the ultimate facts are; that is, the essential facts which control as to what the verdict should be. With these facts found, they should then decide to what result—what general verdict—they lead. The jury were sworn to decide the case according to the law as given by the court, and the evidence. The general tenor of previous instructions is that they should decide the case upon the evidence, and then they were specifically told that they must decide upon these special questions in the same manner as their general verdict. Thus far the jury could be in no doubt but that they were to decide the special questions from the evidence. The caution which follows could not lead to a different conclusion. True, it would have been more exactly correct if it had cautioned them to be careful that their general verdict was in harmony with the answers, as the answers control; but we do not think, in view of what preceded, that the jury could have understood that they were to decide upon their answers to the special interrogatories from anything but the evidence. *People v. Murray*, 52 Mich. 289; 17 N. W. Rep. 843.

Our conclusion upon the whole record is that the judgment of the district court should be *affirmed*.

COFFEYVILLE VITRIFIED BRICK COMPANY
V. ZIMMERMAN.

Supreme Court of Kansas. 1900.

61 Kansas, 750.

The opinion of the court was delivered by

SMITH, J.: This was an action for damages by the plaintiffs below, the father and mother of Arthur Zimmerman, who was killed by the falling of an embankment under which he was at work while in the employ of plaintiff in error. The action was brought under section 418, chapter 95, General Statutes of 1897 (Gen. Stat. 1899, Sec. 4686), and there was a verdict and judgment for plaintiffs. One of the instructions given by the court to the jury, over the objection of plaintiff in error, was as follows:

“Your answers and findings should be consistent each with the other, and should be consistent with the general verdict, in order that any amount, if any you find in favor of the plaintiff, must be consistent and in harmony with the answers that you make to these special questions. Whatever verdict may be returned in this case, if not for the defendant, it is largely upon the answers you make to these questions, and they should be consistent each with the other.”

It was clearly erroneous for the court to require the jury to make their answers to the particular questions of fact harmonize with the general verdict, or to suggest that the findings should be consistent each with the other. Each of the questions propounded should be answered truthfully, in accordance with the preponderance of evidence upon the question submitted. Under our statute, when the special finding of facts is inconsistent with the general verdict, the former controls the latter, and the court may give judgment accordingly. (Gen. Stat. 1897, ch. 95, § 297; Gen. Stat. 1899, § 4550.) The questions should be answered without any reference to their effect on the general verdict. (*Dry Goods Co. v. Kahn*, 53 Kan. 274, 36 Pac. 327.)

* * * * *

For the error in the instruction given, the judgment of the court below will be reversed and a new trial ordered.

SECTION 4. FORM OF INTERROGATORIES.

LOUISVILLE, NEW ALBANY & CHICAGO RAILWAY
COMPANY V. WORLEY.*Supreme Court of Indiana. 1886.**107 Indiana, 320.*

ELLIOTT, J. * * *

* * * * *

The appellant submitted to the court interrogatories, and asked that they should be submitted to the jury, but the court, instead of submitting those asked by the appellant, prepared and submitted interrogatories of its own. The prayer for the submission of the interrogatories to the jury was not a proper one, for the court was not asked to instruct the jury to answer the interrogatories in the event that they returned a general verdict. *Taylor v. Bruk*, 91 Ind. 252.

We have, however, examined the interrogatories, and find that those propounded by the court substantially covered those asked by the appellant, so far as they were competent and material. Our decisions are that it is proper for the trial court to revise interrogatories submitted by the parties, and to prepare and propound for itself proper interrogatories to the jury. *Killian v. Eigenmann*, 57 Ind. 480.

The court submitted this interrogatory. "Could the defendant have lawfully fenced its track at the point where said mules entered upon the track?" It is contended that this interrogatory is not a proper one, as it calls upon the jury to decide a question of law, and not of fact, and thus casts upon them a duty that the court should perform. We can perceive no answer to this contention, and appellee's counsel have not suggested any. Our statute makes it the duty of the court to submit to the jury only questions of fact, and the question here submitted is, it seems to us, one of law. The purpose of addressing interrogatories to juries is to elicit decisions upon matters of fact, and not to ask them to state conclusions of law. Whether the track of a railroad company is, or is not, lawfully fenced, is a mere

conclusion to be deduced from the facts. We have repeatedly decided that parties are entitled in special verdicts and in special findings to a statement of the specific facts, and that statements of mere conclusions will not be sufficient. *Pittsburg, etc., R. R. Co. v. Spencer*, 98 Ind. 186, and authorities cited; *Louisville, etc., R. W. Co. v. Balch*, 105 Ind. 93; *Indianapolis, etc., R. W. Co. v. Bush*, 101 Ind. 582; *Pittsburgh, etc., R. W. Co. v. Adams*, 105 Ind. 151.

That principle governs here. The jury should be required to state facts, and not conclusions of law, and the answer to the question propounded in this instance could be, as it was, nothing more than the statement of the jury's conclusion as to whether the railroad company could lawfully fence its track at the place where the mules entered upon it. Whether it could lawfully fence at that place depended upon the character and surroundings, and when these are fixed the question whether it could be lawfully fenced becomes one of law for the decision of the court. There are many facts which make it improper for a railroad company to fence, as, for instance, the fact that to fence would interfere with the discharge of the company's duty to the public, or would make the place dangerous to its servants, and it is for the jury to state the facts, leaving the law to be applied by the court to the facts found by the jury.

It was held in the case of *Jeffersonville etc., R. R. Co. v. Underhill*, 40 Ind. 229, that an allegation that the railroad was "not fenced according to law," was the statement of a legal conclusion, and this general principle is declared in many cases. *Indianapolis, etc., R. R. Co. v. Bishop*, 29 Ind. 202; *Indianapolis, etc., R. R. Co. v. Robinson*, 35 Ind. 380; *Pittsburgh, etc., R. R. Co. v. Brown*, 44 Ind. 409; *Singer Manufacturing Co. v. Effinger*, 79 Ind. 264.

We think it clear on principle and authority that the court erred in submitting the interrogatory under immediate mention to the jury. In view of the fact that the court rejected interrogatories submitted by the appellant, and undertook to substitute those of its own, the error must be regarded as a material one. It would defeat the manifest purpose of the statute to allow conclusions of law, rather than statements of facts, to be made by the jury, for the purpose of the statute is to get upon record the specific and

material facts in the form of answers to interrogatories.

Judgment reversed.

CHICAGO & ALTON RAILROAD COMPANY
V. HARRINGTON.

Supreme Court of Illinois. 1901.

192 Illinois, 9.

The East St. Louis freight yard of the Toledo, St. Louis and Kansas City railroad, (commonly called the "Clover Leaf,") is what is called a stub-yard, and the only way of getting into and from the yard with cars is from the east end of it. A main or lead track runs from the east end of the yard to the freight house at the west end. From this main or lead track a number of switches branch off westerly, on which are received freight cars coming from other roads, at all hours of the day and night. The switch tracks are connected with the main or lead track by switches.

On January 27, 1897, early in the morning, and while it was yet dark and was snowing, a switch crew of the appellant company transferred a number of cars of perishable freight from appellant's road to a switch track of the Clover Leaf road, and, in doing so, omitted to place the cars a sufficient distance down the switch track to allow a locomotive and cars to pass along the lead track without coming in contact with the last car so placed on the switch track, and also omitted to close the switch, but left it open.

Several hours before the servants of the appellant company had thus transferred its cars to a switch track of the Clover Leaf road, a switching crew of the Clover Leaf road had gone out of the yard up to Madison, or Miller's Station, to take some cars, and returned to the freight yard of the Clover Leaf road after appellant's switching crew had finished their work and left the yard. The switching crew of the Clover Leaf road, which thus entered the freight yard between four and six o'clock on the morning of January 27, 1897, consisted of five men. Of these five men one was the

fireman and one was the engineer. Besides the fireman and engineer there was a foreman and there were also two helpers. Appellee was one of these helpers. When the switching crew of the Clover Leaf road come down the lead track, two freight cars were fastened to the locomotive ahead of it, so that the two freight cars were pushed forward by the locomotive. When the switching crew entered the freight yard, the engineer and fireman were in their proper places upon the locomotive. The foreman was in the cab of the engine. One of the helpers was on top of the forward car of the two cars which were pushed by the engine. Appellee, the other helper, was standing upon the foot-board in front of the engine and between the engine and the second or last of the two cars. The engineer was named Neff. The fireman was named Thomas or Thompson. The foreman was named Donahue. The helper on the forward car was named Fox. They were shoving the two cars westward to the freight house, and it was the intention to cut the cars off and leave them.

When the servants of the appellant transferred appellant's cars, containing perishable freight, from appellant's road to one of the switchtracks of the Clover Leaf road in the freight yard of the latter, they left the switch open, and the hindmost of appellant's cars projected over from the side switch, upon which said cars stood, on to the main or lead track. The result was that, when the engine and the two cars ahead of it, which the switching crew of the Clover Leaf road were pushing, reached the switch track on which appellant's servants had left its cars, the cars, so pushed by the Clover Leaf switching crew, ran into and collided with appellant's cars. The result of this collision was that the locomotive, on the front foot-board of which appellee was riding, and the rear car of the two cars in front of the locomotive, came together, breaking appellee's legs, tearing off a finger, and otherwise severely injuring him.

The negligence, charged in the declaration against the servants of appellant, was that they left the cars, containing perishable freight, on the switch track, and neglected to close the switch.

* * * * *

MR. JUSTICE MAGRUDER delivered the opinion of the court.

* * * * *

Fourth—An objection is also made by appellant to the action taken by the trial court in reference to the special interrogatories submitted to the jury, calling for special findings upon their part.

In the first place, the court declined to give the interrogatories submitted by appellant, and prepared interrogatories of its own motion, which were submitted. This was not error; we have decided that a trial court may refuse requests for special findings, and substitute others on its own motion. (*Chicago & Alton Railroad Co. v. Pearson*, 184 Ill. 386; *Norton v. Volzke*, 158 id. 402).

By the first interrogatory submitted by appellant, the jury were asked whether it would not have been safer, if appellee had placed himself on the rear foot-board of the engine on the night in question, as the train was entering the yard of the Clover Leaf. This interrogatory was properly refused, because an affirmative answer to it could not have controlled a general verdict had it been in favor of appellee. (*Chicago & Northwestern Railway Co., C. Dunleavy*, 129 Ill. 133). The second interrogatory, which required the jury to find whether "the act of plaintiff, in negligently placing himself on the foot-board of the engine next to the car," contributed to cause the injury, was properly refused because it assumed that appellee was negligent. The third interrogatory which required the jury to find whether the accident to the plaintiff was caused by the negligence of one Fox, who was on the first car of the train, was properly refused, because it called for an evidentiary fact only, and so, could not have controlled a general verdict for appellee. Upon this subject the Appellate Court in deciding this case well say: "Although Fox and appellee were fellow-servants of a common master, and engaged in the same line of duty, yet that master, was not appellant; hence the fact, that they were fellow-servants, could not be availed of by appellant to protect itself against the negligence of Fox, if appellant's negligence contributed to the injury. If the inquiry had been whether the negligence of Fox was the sole cause of the injury, the condition of the matter would have been different from what it now is. Although the negligence of Fox might have caused the injury, yet the negligence of the servants of appellant might also have contrib-

uted to the injury, and an affirmative answer, that did not fully negative the latter, would have established an evidentiary fact only. The reasons given, why the court did not err in refusing to give the third interrogatory, apply as well to the fourth interrogatory."

The interrogatories submitted by the court of its own motion, were as follows:

"1st. If you find a general verdict for the plaintiff in this case, you will also answer and return with your verdict the following questions:

"Did the act of the plaintiff, John Harrington, in placing himself on the foot-board of the engine next to the car contribute to cause the injury he received?

"2nd. Was the plaintiff, John Harrington, using proper care for his own safety by being upon the foot-board of the engine between the car and the engine when he was injured?"

The jury answered "No" to the first interrogatory, and "Yes" to the second. As is stated by the Appellate Court, the two interrogatories, submitted by the court of its own motion, contained all that was important in the fifth and sixth interrogatories asked by the appellant, and, hence, no error was committed in refusing to submit the latter to the jury.

The main ground, however, upon which the appellant charges that the interrogatories submitted by the court on its own motion were erroneous, is that they began with this statement: "If you find a general verdict for the plaintiff in this case." The contention is that it was erroneous to put the words, "for the plaintiff," after the words, "general verdict." It would have been better if the court had left out the words "for the plaintiff:" but their insertion could not have done appellant any harm.

The third section of the act in regard to special findings and special verdicts, provides that, when a special finding of fact is inconsistent with the general verdict, the former shall control; and we said in *Chicago & Northwestern Railway Co. v. Dunleavy*, *supra* (p. 144): "This necessarily implies that the fact to be submitted shall be one which, if found, may in its nature be controlling. That can never be the case with a mere evidentiary fact. * * * Such inconsistency can arise only where the fact found is an ultimate

fact, or one from which the existence or non-existence of such ultimate fact necessarily follows, and that is never the case with that which is only *prima facie* evidence of the fact sought to be proved." In *Chicago & Northwestern Railway Co. v. Dunleavy, supra*, we also said that an error committed in the giving of specific interrogatories, or in the answers of the jury to the same, cannot be regarded as being prejudicial to the defendant, "unless it can be seen that answers to said questions most favorable to the defendant, which of course would have been answers in the negative, would have constituted a finding inconsistent with the general verdict." Interrogatories asked by the defendant are framed for the purpose of controlling any general verdict that may be returned for the plaintiff. In the case at bar, the answers, which might be given to the interrogatories framed by the court, might have had the effect of controlling a general verdict for the plaintiff, but could have had no effect in controlling a general verdict for the defendant. If the jury had answered, that the act of the plaintiff, John Harrington, in placing himself on the foot-board of the engine next to the car, did contribute to cause the injury he received, and if they had answered that the plaintiff was not using proper care for his own safety by being upon the foot-board of the engine between the car and the engine, then the special finding would have been inconsistent with the general verdict in favor of the plaintiff, and such general verdict would have been controlled by the special finding. But, in case of a general verdict for the defendant, an affirmative answer to the first interrogatory framed by the court, and a negative answer to the second interrogatory framed by the court, would have been consistent with such general verdict for the defendant, and not inconsistent with it. If, in case of a general verdict for the defendant, the first interrogatory had been answered in the negative, and the second in the affirmative, it may not have affected the general verdict in favor of the defendant, because the evidence may have shown that the defendant was not guilty of negligence, and, if the defendant was not guilty of negligence, the plaintiff was not entitled to recover even if he was not guilty of contributory negligence. The interrogatories, submitted by the court were designed to secure a special finding as to certain matters which might supersede the gen-

eral verdict, if the verdict should be for the plaintiff, and it was not improper to put the matter to the jury in that way. "The facts, upon which a jury should be asked to find specially, should be material facts, which, if found, would be controlling." (*Chicago & Northwestern Railway Co. v. Dunleavy*, *supra*; *Terre Haute & Indianapolis Railway Co. v. Voelker*, 129 Ill. 540; *Pike v. City of Chicago*, 155 id. 656). The theories of appellant, as embodied in the special interrogatories submitted by it, were presented in the instructions given by the court.

It is also said that the interrogatories given by the court were defective in limiting the exercise of due care to the time when the plaintiff was injured. This criticism is without force, because we have held that the words "at the time," when used in an instruction in such cases, refer to the whole transaction or series of circumstances, and not to the precise moment when the injury occurs. Here, the words "in placing himself upon the foot-board of the engine," etc., refer to the circumstances which preceded that act, as well as the act itself of standing on the foot-board of the engine. (*Chicago & Alton Railroad Co. v. Fisher*, 141 Ill. 614; *Lake Shore & Michigan Southern Railway Co. v. Ouska*, 151 id. 238; *McNulta v. Lockridge*, 137 id. 270; *Lake Shore & Michigan Southern Railway Co. v. Johnson*, 135 id. 653.)

* * * * *

After a careful examination of the record, we are unable to discover any reason, which would justify us in reversing the judgments of the lower courts in this case.

Accordingly, the judgment of the Appellate Court is affirmed.

Judgment affirmed.

ATCHISON, TOPEKA & SANTA FE RAILROAD
COMPANY V. AYERS.*Supreme Court of Kansas. 1895.**56 Kansas, 176.*

The opinion of the court was delivered by

MARTIN, C. J.: I. The original action was brought by the defendant in error against the plaintiff in error to recover damages for the alleged negligent burning of a grain elevator, a hay press, some baled and a quantity of loose hay, and other property. The trial resulted in a verdict and judgment for the plaintiff. * * *

* * * * *

II. The defendant pleaded and largely relied upon the contributory negligence of the plaintiff as a defense, such negligence arising from permitting dry hay to accumulate around the building in large quantities, extending therefrom to the tracks of the company, so as readily to catch fire from sparks emitted from the locomotive when properly managed. A great deal of the evidence related to the condition of the building and the premises around it, the same being used for the baling of hay and the storing of the same, both baled and loose. The defendant submitted 10 particular questions of fact in relation to the condition of different parts of the premises, three questions pertaining to the age of different parts of the building, and one as to the same never having been painted. The first 10 questions were objectionable in form, No. 1 being as follows: "Is it not a fact that the fire caught in the dry grass and rubbish that had accumulated near the northeast corner of the building?" instead of directly asking the jury "Did the fire catch in the dry grass," etc. Questions in a negative or a leading form should never be submitted, and these were both leading and negative, and any direct answer to them by yes or no was liable to be misunderstood. The court refused to submit the 14 questions referred to, and was proceeding to state the reasons therefor, when defendant's counsel objected to any argument in the presence of the jury, but this was overruled, the defendant excepting, and the court, referring to the first 10 questions, said, among other things:

“Suppose these questions should be answered as the defense asks that they should be answered—that this combustible material was scattered around there—it does not show that the plaintiff was guilty of negligence. * * * It gives no light to the court or any reviewing court.” We regard the remark as improper in the presence of the jury. It was a statement as a proposition of law that the scattering of combustible material upon and over the plaintiff’s premises was not negligence. That was one of the principle questions to be submitted to the jury, and they would be very liable to interpret this remark of the judge as a declaration that all the evidence as to the existence of combustible matter around and about the premises was immaterial. The first 10 questions seem quite pertinent to the issue, although the answers to them in the manner most favorable to the defendant may not have been sufficient alone to overthrow a verdict in favor of the plaintiff. We do not understand this, however, to be the test of the competency of particular questions of fact requested. If the questions are plain and direct in form, are within the issues, are not repetitions, and there is evidence upon which they may be intelligently answered, they ought to be submitted, so that the detailed facts may appear of record; thus enabling the trial court, upon further proceedings, or a reviewing court afterward, to form an intelligent judgment upon the particular issues sought to be elucidated by the questions and answers. It would have been proper to submit the other four questions, for they were remotely within the issues, but they were not especially material, and the refusal of the court to submit them would not be reversible error. It is generally error to refuse to submit questions of fact drawn in proper form, material to the case, and based upon the evidence. Section 286 of the civil code has been uniformly held to grant a right to the parties to have proper questions of fact submitted to the jury. (*Bent v. Philbrick*, 16 Kan. 190; *C. B. U. P. Rld. Co. v. Hotham*, 22 id. 41; *A. T. & S. F. Rld. Co. v. Plunkett*, 25 id. 188, 198; *City of Wyndotte v. Gibson*, 25 id. 236, 243; *W. & W. Rld. Co. v. Feckheimer*, 36 id. 45, 51; *Kansas City v. Bradbury*, 45 id. 381, 388.) Of course, it is the duty of the court to revise the questions, to strike out or amend those drawn by the attorneys in improper form or equivocal in their mean-

ing, and those outside of or immaterial to the issues, as also such as are not based upon any evidence in the case. (*Mo. Pac. Rly. Co. v. Holley*, 30 Kan. 465, 472, 473.)

* * * * *

The judgment must be reversed, and the case remanded for a new trial.

All the Justices concurring.

SECTION 5. COMPELLING JURY TO GIVE DIRECT ANSWERS.

CLEVELAND, COLUMBUS, CINCINNATI & INDIAN- APOLIS RAILWAY COMPANY V. ASBURY.

Supreme Court of Indiana. 1889.

120 Indiana, 289.

BERKSHIRE, J.—This was an action instituted by the appellee to recover damages on account of personal injuries which she claims to have sustained because of the fault of the appellant.

* * * * *

The appellant, at the proper time, moved the court to require the jury to retire to their room to consider further of their answers to interrogatories numbered 4, 5, 6, 8, and 10, submitted to them at the request of the appellant, and to return definite, certain, and direct answers thereto, which motion was overruled, and an exception saved.

These interrogatories, and the answers thereto, are as follows:

“4. Did not Daniel Asbury, the owner of said horse, hear the whistle of the approaching train while driving said horse between the residence of Martha Helms and the crossing where the accident occurred?

“Answer. We do not know by the evidence that it was the train whistle.

“5. Could not the plaintiff and Daniel Asbury have seen the approaching train, or the head-light of its locomotive, if they had looked from a point on said highway thirty-five feet south of said crossing, in time to have averted the accident?

“Ans. We don't know.

“6. From a point thirty-five feet south of the crossing where the accident occurred on the highway or street along which Asbury drove, how far from said crossing could the approaching train be seen?

“Ans. In daylight it might have been seen a mile.

“8. How often was said whistle sounded before the accident as said train approached the crossing?

“Ans. We don’t know what crossing was meant.

“10. Was not a bell attached to said engine, and was not said bell rung continuously from said tile-shed crossing to the place where the accident occurred?

“Ans. There was a bell attached, but we do not know that it was rung continuously.”

The answers to these interrogatories were evasive and improper. There was evidence bearing upon every fact covered by these interrogatories, and the jury should have answered them definitely and in direct language. It would have been no more improper had the jury returned a general verdict, “We, the jury, do not know whether we ought to find for the plaintiff or defendant,” than to have returned the answers they did to the said interrogatories; and the court should have declined to receive the answers returned, as it would have declined to receive a general verdict in the form we have given, upon proper objection made.

If there was a disagreement among the members of the jury as to the answers that should be made to the interrogatories, or if the evidence was such that they could not find the facts, or any of them, to which the interrogatories related, then the jury should have so informed the court, and in receiving the answers as made the court committed an error. It should have sustained the motion of the appellant, and required the jury to retire and return proper answers to the interrogatories, or, in case of a disagreement, to so inform the court. There seems to have been a disinclination on the part of the jury to answer the interrogatories; the answer to the eighth especially indicates that: “How often was said whistle sounded before the accident as said train approached the crossing.” There was but one crossing in question, and that was the one where the accident happened, and the jury could but understand that that was the crossing referred to in the interrogatory, and

yet they answer, "We do not know what crossing is meant."

The evidence was not complicated, and there was very little conflict, if any, as to many of the facts inquired for in these interrogatories, and especially those relating to the care and caution exercised by the appellee and her husband. The appellant was entitled to full and fair answers to its interrogatories.

* * * * *

We are aware of the rule that the court may refuse to require the jury to retire and make more definite answers to interrogatories, and that it will not be available error if the answers demanded would not, if given, change the result as to the judgment to be rendered. *McCormick, etc., Co. v. Gray*, 100 Ind. 285; *Chicago, etc., R. R. Co. v. Hedges*, 105 Ind. 398. But had the interrogatories under consideration been answered in the affirmative, they would have controlled the general verdict.

Affirmative answers to these interrogatories would have disclosed, beyond question, contributory negligence on the part of the appellee and her husband, and gone far in the direction of establishing due care on the part of the appellant.

* * * * *

Because of the error of the court in overruling the motion to require the jury to retire and make more definite and certain the answers to the interrogatories, the judgment must be reversed.

Judgment reversed, with costs.

SECTION 6. EFFECT OF ANSWERS ON GENERAL VERDICT.

RUNYAN V. KANAWHA WATER & LIGHT COMPANY.

Supreme Court of Appeals of West Virginia. 1911.

68 West Virginia, 609.

Action by C. D. Runyan, administrator of Walter Runyan, against the Kanawha Water & Light Company. A verdict

for plaintiff having been set aside, he brings error.

BRANNON, Judge:

The Kanawha Water & Light Company, a corporation furnishing electricity for public consumption in the city of Charleston, had its wires on a bridge over the Kanawha River for conveyance of electricity. Walter Runyan was an employe of the bridge company engaged in painting the bridge, and while so employed came in contact with an electric wire, and was so badly burned by the electricity that he died. His administrator sued the Kanawha Water & Light Company, and recovered a verdict for \$5000, and the court having set the verdict aside, the plaintiff comes to this court.

* * * * *

The main defense in the case is contributory negligence. The general verdict finds against that defence; but defendant insists that that verdict is overruled by a finding in answer to an interrogatory. This has given us some perplexity, and is the question of gravity in the case. The interrogatory is this: "If Walter Runyan had been careful, considering the knowledge he had of the wires, would he have been injured?" The answer is, "We think not." Is this inconsistent with the general verdict so as to overrule it? It must be so inconsistent that both cannot stand together. If possible they must be construed so as to harmonize; or rather, as applied to this case, we must be able to say that the finding finds a fact which inevitably overthrows the general verdict. It must exclude every conclusion that would authorize a verdict for plaintiff. *Peninsular Land Co. v. Ins. Co.*, 35 W. Va. 666. As a practical question in this case, Does this finding find as a fact that Runyan was guilty of contributory negligence defeating the action? If it does not, it is not the overthrow of the general verdict. It does not find facts to enable the court to say whether such contributory negligence was a fact. This consideration at once denies this finding any force to overthrow the general verdict. This interrogatory was put to get from the jury an expression to sustain the charge of contributory negligence. It does not ask the jury whether such and such facts exist, facts which would in law constitute negligence, as it must. The law is that an interrogatory must put only questions of fact from which a legal proposition may be

deduced. What facts arising on the evidence does this interrogatory inquire about? The interrogatory must ask as to facts such as, if answered as desired by the interrogator, will make a verdict for his adversary inconsistent. Any question the answer to which would be inconclusive, and which would not be so inconsistent, should not be put. 20 Ency. Pl. & Prac. 328. "Questions which require the jury merely to answer as to acts or omissions which may or may not in their opinion be evidence of care or negligence, or from answers to which, either way, the court cannot say, as a matter of law, whether care or negligence is the result, are not material." Clementson on Special Verdicts, 73. This interrogatory, without specifying facts on which to base the opinion, simply asks the jury whether in its opinion Runyan exercised care. Virtually it asks the jury whether in its opinion Runyan was guilty of contributory negligence, a mixed question of law and fact, I may say of law. Such an interrogatory is not good. The failure to ask as to facts on which carelessness, or in other words, contributory negligence, is sought to be predicated is a fatal defect in this interrogatory, and must render its answer abortive. The answer does not find in words that Runyan was guilty of contributory negligence, and could not, since a question calling upon a jury to find on a question of law must not be submitted. 20 Ency. Pl. & Prac. 326; Clementson on Special Verdicts, 117, 217. He is not proven negligent. It does not appear.

But take the question and answer as they are. This finding says that if Runyan had been careful he would not have been injured. Does this come up to the standard of full contributory negligence? No. It does not tell in what he was careless, or to what degree. Runyan having a right to be where he was in work, he could go near or over the wires, unless he knew that there was positive actual danger staring him in the face. If he by accident fell upon or caught his foot in the wires, this would not bar recovery. He might not have used the highest degree of care and yet not be found guilty of contributory negligence defeating the action. We cannot see what was the extent of his knowledge of danger, whether or not he knew of defects in insulation. He was called on to use only ordinary care required of a prudent man under the circumstances; but this finding

does not indicate what care or carelessness he used. We cannot from the finding say, or guess, whether he exercised the only care required by law, ordinary, or was chargeable with gross negligence. In the one case he would not be guilty of contributory negligence defeating the action; in the other he would. We cannot say which from the question and answer. The main verdict finds no negligence, and we are asked to say from the special finding that there was; and thus make the special finding inconsistent with the main verdict, when the special one does not give facts which, in law, impute contributory negligence.

There is another defective feature of this finding to show its inadequacy to overcome the general verdict. It is in the inconclusive language, "We think not." "Answers expressing only the inclination of the minds of the jury, as to say, 'We think not' are insufficient and too uncertain to base a judgment on." *Hopkins v. Stacey*, 43 Ind. 554. Eminent authority there cited says, "An opinion is not a legal verdict, and verdicts must be positive, certain and free from all ambiguity." This position may be assailed as technical; but remember that special finding, to overcome general verdicts must be certain and clearly and plainly inconsistent with it. I grant that there are authorities holding otherwise. 20 Ency. Pl. & Prac. 344. I cannot say that I would for this defect alone reject the answer; still it must be said that the answer is indefinite and leaves the mind in doubt whether the jury intended to find a definite fact. Why did it not say "No," if so intended? The law says that answers to interrogatories should be "direct, definite, certain and complete." 20 Ency. Pl. & Prac. 342.

Again this question 10 called upon the jury to say whether if Runyan had been careful he would have been hurt. "Only such questions as can be fairly and intelligently answered should be submitted. Interrogatories requiring the jury to speculate as to what might have happened in a certain contingency should not be submitted." *Atchison &c. v. Lannigan*, 42 Pac. 343. Therefore, we must regard the answer mere speculation, and not on specific facts, not a flat finding. Findings must be free of obscurity. "They must destroy the general verdict, if at all, only by their own inherent clearness and strength." Clementson on Special Verdicts 135. Thompson on Trials, § 2693 says: "The

court will not strain the language of the special findings to override the general verdict. If possible they will be interpreted to support the verdict rather than overturn it. No presumption will be made in their favor; nor will they control the general verdict, unless they are invincibly antagonistic to it."

Another objection to this finding, depriving its answer of force, is, that it assumes a very material fact, that is, that Runyan knew the condition of the wires, their danger, etc. This had a tendency to lead the mind of jurors to conclude that Runyan had such knowledge, that even the judge thought so, else he would not have allowed such an interrogatory. An interrogatory must not assume material facts. 20 Ency. Pl. & Prac. 322; *Elliot v. Reynolds*, 16 Pac. 698; *Toledo R. Co. v. Goddard*, 25 Ind. 185.

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Therefore, we reverse the order setting aside the verdict, and render judgment upon that verdict for the plaintiff.

Reversed and rendered.

EVANSVILLE & SOUTHERN TRACTION COMPANY V. SPIEGEL.

Appellate Court of Indiana. 1911.

— *Indiana Appellate*, —; 94 *Northeastern*, 718.

LAIRY, J. This is an action brought by the appellee, George P. Spiegel, against the appellant for damages occasioned by the death of Carl Spiegel, the minor son of appellee, which death is alleged to have been caused by the negligence of appellant in the operation of one of its cars on Main street in the city of Evansville, Indiana. The direction of Main street is a little east of north, and the appellant company has a double street car track near the center of said street. Williams street enters Main street from the east, at a point almost opposite to the place where Sycamore street enters it from the west, so that the south line of Williams street, at the point of its connection with Main street, is almost opposite to the point where the north line

of Sycamore street connects with it on the west. The accident in which Carl Spiegel lost his life occurred about noon on the 4th day of October, 1907. He came out of Williams street riding a bicycle, and started diagonally across Main street toward Sycamore street, and was struck and killed by a street car going south on the west track.

* * * * *

(3) On behalf of appellant, it is urged that its motion for judgment on the interrogatories notwithstanding the general verdict should have been sustained, for the reason that these answers show that the decedent was guilty of negligence contributing to his death. The general verdict in favor of the plaintiff is a finding of every material fact necessary to a recovery. The special failings of the jury will overthrow the general verdict only when both cannot stand, and this antagonism must be apparent on the face of the record beyond the possibility of being removed by any evidence admissible under the issues made by the pleadings. The evidence actually introduced cannot be considered in passing upon this question. *Cox v. Ratcliffe*, 105 Ind. 374, 5 N. E. 5; *Indiana National, etc., Co. v. Long*, 27 Ind. App. 219, 59 N. E. 410.

(4) Under the issues formed by the pleadings in this case, evidence might have been introduced which would bring the case within the operation of the doctrine known as the "last clear chance." This doctrine is clearly stated by a writer in the Quarterly Law Review (vol. 2, p. 507), as follows: "The party who last has a clear opportunity of avoiding the accident, notwithstanding the negligence of his opponent, is considered solely responsible for it." This has been frequently recognized and applied by our courts.

* * * * *

(5) Even though it be conceded that the answers to the interrogatories show that the plaintiff's decedent negligently approached and entered upon the track of the appellant in front of an approaching car, and thus negligently exposed himself to the danger of a collision, this would not necessarily preclude a recovery from injury resulting from appellant's negligence. Answers to interrogatories showing such facts would not overthrow a general verdict in favor of the plaintiff, for the reason that evidence may have been introduced proving or tending to prove that, after said

decendent was in the position of danger in which he had so negligently placed himself, the defendant knew of his perilous position, or might have known it by the exercise of ordinary care, in time to have prevented the injury, and that it negligently failed to take advantage of the last clear chance to prevent the injury. It is the duty of this court to reconcile the interrogatories with the general verdict if they can be so reconciled by any evidence which might have been introduced within the issues; and, to this end, the court, in ruling upon this motion, will treat the case as though this evidence had been introduced and acted upon by the jury. In view of what we have said, we are of the opinion that the answers to the interrogatories are not in irreconcilable conflict with the general verdict, and the motion of appellant for judgment in its favor on such interrogatories notwithstanding the general verdict was properly overruled.

* * * * *

[*Reversed on other grounds.*]

DEVINE V. FEDERAL LIFE INSURANCE COMPANY.

Supreme Court of Illinois. 1911.

250 Illinois, 203.

MR. JUSTICE COOKE delivered the opinion of the court:

This was an action brought in the municipal court of the city of Chicago by John F. Devine, as administrator of the estate of Ralph W. Chance, deceased, against the Federal Life Insurance Company, to recover the sum of \$1000 alleged to be due on a policy of insurance claimed to have been issued by the company to Chance in his lifetime. The policy was dated May 4, 1907. Chance was struck and killed by a train of the Illinois Central Railroad Company on the morning of May 30, 1907. The defense to the action was that the policy had never been in force, as it had not been delivered to Chance and he had never paid any part of the first premium. The claim of the administrator was, that by an arrangement with Robert J. Jeffs, the gen-

eral agent for the insurance company and the person who secured the application of Chance, the policy was delivered by the company to Jeffs for Chance, and it was held by Jeffs to secure the payment of three notes given by Chance to Jeffs, one for the amount of the first premium, one for \$50 and one for \$10.14. After the death of Chance, and on June 3, 1907, Jeffs, who had held the policy from the time of its issuance until that date, returned it to the insurance company, endorsed "not taken." The jury found the issues for the plaintiff and returned a verdict for the full amount of the policy, \$1000. Judgment was rendered on this verdict and an appeal was taken to the Appellate Court for the First District, where the judgment of the municipal court was affirmed. The case is brought here by appeal upon a certificate of importance.

It is first contended that this judgment should be reversed for the reason that the general verdict is contrary to certain special findings of fact made by the jury. The jury were asked to answer twelve special interrogatories which were submitted to them. Of the twelve, three were so framed that no answer was required by reason of the answers given to certain others of the interrogatories. By the first interrogatory the jury were asked, "Was the policy sued on in this action delivered by the Federal Life Insurance Company to Ralph W. Chance during his lifetime?" To this the jury answered "no," and it is claimed that this finding is so inconsistent with the general verdict that it must be held to control the same and that the court should have entered judgment for the appellant. In determining whether a special finding is so inconsistent with the general verdict that the latter must be held to be controlled by the former we cannot look at the evidence. All reasonable presumptions will be entertained in favor of the general verdict while nothing will be presumed in aid of the special finding of fact. The inconsistency must be so irreconcilable as to be incapable of being removed by any evidence admissible under the issues. (*Chicago and Northwestern Railway Co. v. Dunleavy*, 129 Ill. 132.) Applying this rule, we find that there is no irreconcilable inconsistency between this special finding of fact and the general verdict. By its terms the application for a policy of insurance may be made a part of the policy itself. The application may or may not provide

that the insurance shall take effect only upon the delivery of the policy to the insured. Unless expressly made so by the contract itself, an actual delivery of a policy of insurance to the insured is not essential to the validity of the contract, and the rule under such circumstances is, that a policy becomes binding upon the insurer when signed and forwarded to the insurance broker to whom the application for insurance was made, to be delivered to the insured. Where an application is made for insurance there is no liability until the application is accepted, but the acceptance and issuing of the policy complete the contract. (*Rose v. Mutual Life Ins. Co.* 240 Ill. 45.) The finding of the jury that the policy had never been delivered to Chance was not the determination of any ultimate fact, or of a fact which had a controlling effect upon any ultimate fact. This finding is not so inconsistent with the general verdict that it should control, and the court did not err in ignoring this finding and entering judgment on the verdict.

It is urged that special findings numbered 3, 5, 6, 7, 8, 10 and 12 are also inconsistent with the general verdict. We do not so regard them. The third finding was that the deceased had not paid the premium on his policy in cash; the fifth, that he did execute a note for the amount of the premium; the sixth, that the note was executed on May 10, 1907, and delivered to Jeffs; the seventh, that the note was payable in installments of \$2.50 each, and that the first installment became due on May 29, 1907; the eighth, that Chance did not pay the installment falling due on May 29, 1907; the tenth, that none of the installments mentioned in said note were paid during the lifetime of Chance; and the twelfth, that the policy sued on contained the provision, "failure to pay any premium or note, or interest thereon, when due, will forfeit, without notice, the policy and all payments thereon, excepting as herein provided." It is not necessary that a premium on a policy of life insurance should be paid in cash. It can be paid by the giving of a note, or otherwise, if so agreed by the parties. That Chance executed a note and delivered it to Jeffs, the agent, for the amount of the first year's premium, and that at the time of his death he was in default in the payment of this note, would not necessarily invalidate the insurance notwithstanding the provision found to have been contained in the policy, as Jeffs

may have taken the note under such circumstances as would constitute an absolute payment of the premium. A further reason why these special findings do not show a forfeiture of the policy is, that by the twelfth finding the policy contained a clause providing for a forfeiture under certain circumstances, "excepting as herein provided." What the exceptions are is not shown by any of the special findings. For anything that is disclosed by these findings, the circumstances may have been such that they come within some exception contained in the policy which would prevent a forfeiture. As we view the special findings of the jury, and testing them by the rule above referred to, we do not regard any of them as inconsistent with the general verdict.

* * * * *

We find no error in the record, and the judgment of the Appellate Court is therefore affirmed.

Judgment affirmed.

MR. CHIEF JUSTICE VICKERS took no part in the consideration or decision of this case.

SECTION 7. EFFECT OF ANSWERS INCONSISTENT WITH EACH OTHER.

DRAKE V. JUSTICE GOLD MINING COMPANY.

Supreme Court of Colorado. 1904.

32 Colorado, 259.

MR. JUSTICE CAMPBELL delivered the opinion of the court.

The controversy here is between the owners of the Washington and Justice lode claims, situate in Gilpin county, as to the ownership of ore bodies of a vein under the surface, and within the exterior boundaries of the Washington lode extended downward vertically. The claim of each party is based upon ownership of the apex.

The cause was tried before a jury, and the court, upon request, submitted, and the jury answered, three interrogatories, and also returned what the parties call a general verdict, in favor of the defendant, on which judgment for it

was entered by the court. The plaintiffs in error claim that the answers to these three interrogatories were in their favor, and are so inconsistent with the general verdict that, under section 199 of our civil code so providing, the special findings of fact, in such circumstances, must control the general verdict.

Where a special finding of fact, inconsistent with the general verdict, is so irreconcilable therewith as to be incapable of removal by any evidence admissible under the general issues, the general verdict cannot stand, and judgment entered upon it is improper. Every presumption and intendment, however, is to be indulged in favor of a general verdict, and in ascertaining whether such inconsistency exists, recourse may not be had to the evidence actually adduced at the trial, but may be to the issues as made by the pleadings; and if, by any possible competent evidence that might be produced thereunder, the apparent inconsistency can be overcome, it may be disregarded, and the general verdict permitted to stand. But in the view we take of whether there is such an inconsistency as the plaintiffs in the case, it is not necessary, for two reasons, to decide error assert.

1. We do not so hold, but for the purpose of the present opinion we assume, with both parties, that the verdict returned is a general verdict, and, with plaintiffs in error, that it is in such irreconcilable conflict with the three special findings of fact to which they allude, as to have made it the duty of the trial court to disregard the general verdict, and enter judgment upon the special findings, had action of the court been seasonably and properly invoked. Such an inconsistency may be waived by the party against whom it operates, or he may, in the appropriate way, complain of it. If, however, a party desires to have heard in an appellate tribunal his objection to the entering of a judgment on a general verdict which is inconsistent with special findings, he must first call the attention of the lower court thereto by a motion for judgment upon the special findings, notwithstanding the general verdict. A motion for a new trial does not save the point. Here plaintiffs in error neglected to move for judgment on the findings, and therefore they may not, on this review, for the first time be heard as to the alleged inconsistency.—2 Thompson on Trials, § 2696.

Many cases in Indiana, where such questions seem to have arisen more frequently than in any other state, expressly hold that such a motion is a necessary condition precedent to the right to be heard in an appellate tribunal.—*Bartlett v. Pittsburgh, etc., Rly. Co.*, 94 Ind. 281; *Anderson et al v. Hubble*, 93 Ind. 570; *Brickley v. Weghorn et al.*, 71 Ind. 497; *Adamson v. Rose*, 30 Ind. 380. Additional authorities are collected in 20 Enc. Pl. & Pr. 375.

2. The foregoing is upon the assumption that only three interrogatories were answered by the jury, and all of them were in favor of plaintiffs, and inconsistent with the general verdict returned for defendant. The record, however, discloses that three other interrogatories submitted by the court were answered by the jury clearly and distinctly in favor of the defendant, and they support, in every particular, the general verdict. These six answers, taken together, do not show that the jury so misunderstood the issues or were in any way so confused as to make a new trial necessary. Such being the case, the doctrine seems to be well settled that contradictory and inconsistent special findings destroy each other, and the general verdict stands.—*Ind., etc., Gas Co. v. McMath*, 26 Ind. App. 154; *Midland Steel Co. v. Daugherty*, 26 Ind. App. 272; 2 Thompson on Trials, § 2692. For additional authorities, see 20 Enc. Pl. & Pr. 354, 364 *et seq.*

* * * * *

The judgment must be affirmed, and it is so ordered.

Affirmed.

ST. LOUIS & SAN FRANCISCO RAILWAY COMPANY V. BRICKER.

Supreme Court of Kansas. 1899.

61 Kansas, 224.

The opinion of the court was delivered by

SMITH, J.: The findings of the jury being inconsistent with one another, the verdict cannot stand. It is found that the direct cause of the injury was the failure of the fore-

man in charge of the bridge repairers to give timely warning to the defendant in error, and neglect of the foreman to inform the men who were unloading the timbers that there was any one under the bridge at work. It is also found that defendant in error knew that his coemployees were at work above him, and that they were about to throw off a stick of timber. This, coupled with the finding that Bricker could have avoided the injury complained of had he remained where he was at work and watched which side of the bridge the stick of timber was about to fall, tends to the conclusion that the defendant in error was guilty of contributory negligence, and that his own want of care, and not that of the foreman, caused the injury. While want of ordinary care on the part of the foreman is expressly found in at least six of the answers to particular questions, yet a strong showing of contributory negligence on the part of plaintiff below appears in three other answers.

The inconsistency between these different findings is so palpable and clear as to render them irreconcilable. In one answer the jury say that plaintiff below had no timely warning of danger, and in another that his situation and information were such that he needed none—in effect, saying that a warning would not contribute to the knowledge he already possessed of his dangerous position. The general verdict, based on such findings, must be set aside. (*Shoemaker v. St. L. & S. F. Rly. Co.*, 30 Kan. 359, 2 Pac. 517; *A. T. & S. F. Rld. Co. v. Weber, Adm'r*, 33 id. 543, 6 Pac. 877; *A. T. & S. F. Rld. Co. v. Maher*, 23 id. 163.)

The judgment of the court below will be reversed, and a new trial ordered.

CHAPTER XIV.

SPECIAL VERDICTS.

FIRST NATIONAL BANK V. PECK.

Supreme Court of Kansas. 1871.

8 Kansas, 660.

BREWER, J.: * * *

* * * * *

In this case a special verdict was returned at the instance of the plaintiff. Objection was made to the verdict on the ground that it did not state all the facts established by the evidence. Special verdicts and findings upon particular questions of fact are by the laws of 1870 matters of right. Laws 1870, p. 173, sec. 7. It is no longer discretionary with the court to require them or not. Under these circumstances it becomes important to determine the scope of a special verdict as fixed by our statute. Considerable difference of opinion has existed in reference to it, and a judicial construction in this court will doubtless be of service in many cases. What is a special verdict? Under our statute the jury can be called upon to respond in three ways—by a general verdict, by a special verdict, and by returning answers to particular questions of fact. True, this latter mode of interrogating the jury can be resorted to only in conjunction with the first, but it is nevertheless a distinct mode. A general verdict embraces both the law and the facts. It states the result of the whole controversy. It determines the ultimate rights of the parties. It combines the decisions of the court with the opinions of the jury. True, the jury receive the law in the instructions of the court, but they apply the law to the facts, and, having combined the two, declare the result. So that under such a verdict they really perform two functions, that of finding the facts, and then that of applying the law to those facts. Any one at all familiar with the experiences of a court-room is aware that the errors of the jury result

oftener from their misapplication of the law as stated, to the facts, than from their misapprehension of the facts. A special verdict, on the other hand, finds only the facts, and leaves to the court the duty both of determining the law and of applying it to the facts. It is thus defined in sec. 285 of the code of civil procedure, Gen. Stat., 684: "A special verdict is that by which the jury finds facts only. It must present the facts as established by the evidence, and not the evidence to prove them." It was decided in 1 Miles, 26, that "if instead of finding facts the special verdict sets out the evidence, a new trial will be granted." Whether that be the necessary result or no, it is clear that a special verdict should not be a recital of testimony, but a finding of certain facts as established by such testimony. But what facts? How minutely may they, must they, be subdivided? The facts stated in the pleadings; as minutely, and no more so in the special verdict, than in the petition, answer, and reply. The special verdict must conform to the pleadings. The word "facts" is used in this section in the same sense, and refers to the same things as when used in sec. 87 of the code, which declares that a "petition must contain a statement of the *facts* constituting the cause of action, in ordinary and concise language without repetition." There are in every cause of action certain essential substantive facts, certain elements, so to speak. Every pleader knows this when he prepares a petition. The omission of any one of these elements renders the petition defective. The failure to prove one defeats the cause of action. Now these essential elemental facts are the ones the special verdict must find, no more, no less. A history of the case in the nature of a recital of the testimony, or a detail of the various steps in the transaction is not the function of a special verdict. It responds to the various facts of the petition like a special denial, touching each separately. The statute clearly points to this construction. It says, (Laws 1870, p. 173, ch. 87, sec. 7, amending sec. 286 of the code,) "the court shall direct the jury to find a special verdict in writing upon all or any of the issues in the case." The *issues* are to be passed upon in the special verdict. In Bacon's Abridgement, vol. 10, p. 313, it is said, citing as authority *United States v. Bright*, Bright's Trial, 199, "If in a special verdict the jury find the issue, all they find beyond is sur-

plusage." The special verdict is simply the response of the jury separately to the several issues presented by the pleadings. * * * * * The judgment will be affirmed. All the Justices concurring.

STANDARD SEWING MACHINE COMPANY V.
ROYAL INSURANCE COMPANY.

Supreme Court of Pennsylvania. 1902.

201 Pennsylvania State, 645.

Opinion by MR. JUSTICE MESTREZAT, March 3, 1902:

This was an action of assumpsit on a fire insurance policy issued by the defendant. On the trial the court below instructed the jury to return a special verdict and to answer the following questions:

1. Did Bedient take possession of the property in the interest of the machine company, and let Markle and Merryman hold it for the company after the assignment for the benefit of creditors and prior to the fire in question?

2. Did the machine company thus acting through Bedient subject the property to hazard not contemplated by the policy and stipulated against by the provisions thereof?

3. What was the loss? This is to be estimated by the cost of repairing or replacing the property with material of like kind and quality so as not to exceed the limit thus indicated.¹

¹ *Form of special verdict.* This method of preparing a special verdict,—in the form of questions to be put to the jury upon all the material facts in the case, is a common and convenient one. It is sometimes prescribed by statute.

In any event, the jury cannot be expected to draw up their own form of special verdict, and it must be done by counsel. As said in *Pittsburgh, Ft. W. and C. Ry. Co. v. Ruby*, (1871) 38 Ind. 294, "Jurors are very competent to understand the evidence, find facts, and draw conclusions from the facts found; but as a general rule, and especially in complicated cases, they are not equal to the task of preparing a special verdict. They do not know what facts should be found to cover the issues, nor the manner of stating them."

Another familiar method is for counsel on each side to prepare a special verdict in the form of a statement of the facts which they believe have been established by the evidence, and submit the same to the trial judge, who thereupon hands both forms, with or without amendment, as he deems proper, to the jury under proper instructions, and the jury may then adopt either one, in the form presented to them or with such changes as they wish to make, as their verdict. *Pittsburgh, Ft. W. & C. Ry. Co. v. Ruby, supra*; 22 Encyc. Pl. & Pr. 993.

The first question was, by agreement of counsel, answered in the affirmative; the jury returned a negative reply to the second question; and to the third question, the answer was \$1,747. Subsequently the court entered judgment on the verdict in favor of the plaintiff for \$1,747.

This appeal is by the defendant and error is alleged in the ruling of the court on the measure of damages, in the construction put upon the policy of insurance by the court, and in entering judgment on the special verdict, the defendant claiming that the facts found were not sufficient to sustain the judgment.

The last reason assigned for reversing the judgment of the court below may be considered first.

It is the province of a special verdict to find and place on record all the essential facts in the case. This includes the disputed as well as the undisputed facts. What is not found by the verdict is presumed not to exist, and no inferences as to matters of fact are permitted to supply the facts themselves which the verdict should have found. In entering judgment, the court is confined to the facts found by the special verdict, and unless they are sufficiently found no judgment can be entered. The jury must find the facts and the court declare the law on the facts so found. Such are the requisites of a special verdict as held in all our cases. In *Wallingford v. Dunlap*, 14 Pa. 33, it is said: "It is of the very essence of a special verdict that the jury should find the facts, on which the court is to pronounce judgment according to law. And the court will not intend anything, especially any fact not found by the jury. * * * The undisputed facts ought to have been incorporated in the special verdict. * * * The court is confined to the facts found by the special verdict. And when a special verdict is given, the court ought to confine its judgment to that verdict. * * * But this special verdict is so defective and erroneous, and the judgment so anomalous in being entered partly on the verdict and partly on what was called undisputed facts, that we must do what has often been done before, reverse the judgment and send the case back for a new trial." MR. JUSTICE MERCUR, delivering the opinion of the court in *Vansyckel v. Stewart*, 77 Pa. 126, says: "It (special verdict) must include both disputed and undisputed facts. The court will not infer a fact not found

by the jury. It must declare the law on these facts alone. As all the essential facts must be found in the verdict, it follows that it cannot be aided by intendment or by extrinsic facts appearing upon the record." In *Tuigg v. Treacy*, 104 Pa. 498, CLARK, J., speaking for the court, says: "We cannot resort to the testimony, or to such extrinsic matters as were undisputed at the trial, or avail ourselves of such even as appear upon the record. It is of the very essence of a special verdict, that the facts found are those upon which the court is to pronounce judgment, according to law. What is not thus found is presumed not to exist, the verdict being conclusively the complete result of the jury's deliberation upon the whole case presented."

In delivering the opinion of the court in the comparatively recent case of *McCormick v. Royal Insurance Company*, 163 Pa. 194, CHIEF JUSTICE STERRETT says: "Nothing is better settled, on principle as well as authority, than that all the facts upon which the court is to pronounce judgment should be incorporated in the special verdict. It is the exclusive province of the jury, in the first place, to determine all disputed questions of fact, from the evidence before them; and then their special verdict is made up of those findings of fact, together with such undisputed facts as may be necessary to a just decision of the cause. * * * The court, in considering a special verdict and entering judgment thereon, is necessarily confined to the facts found and embodied in the verdict; the latter cannot be aided by intendment or extrinsic facts that may appear in the evidence."

Applying these principles to the case in hand, it is apparent that the verdict here is fatally defective. As said by CHIEF JUSTICE BLACK in *Thayer v. Society of United Brethren*, 20 Pa. 63, "the jury found a special verdict, but it omits almost every importance fact." Here the verdict found but three of the many facts necessary to support a judgment. It is silent as to whether a policy of insurance, the basis of this action, was issued to the plaintiff, and the terms of the policy; as to what property was insured and where situated; as to the loss of or damage to the insured property and whether it occurred within the life of the policy; and as to the cause of the loss, whether by fire or otherwise. Other omissions of fact might be suggested, but

those named are sufficient to show that the verdict is wholly inadequate to sustain the judgment entered by the court below. A special verdict more barren of facts is not to be found in the reported cases.

* * * * *

* * * the judgment is reversed and a *venire facias de novo* is awarded.¹

¹ There is some authority to the contrary, as in Wisconsin, but see *Hodges v. Easton* (1882) 106 U. S. 408, where it was held that the practice of rendering judgment on a special verdict which found only the disputed facts but not those undisputed, was a denial of the right of trial by jury.

WABASH RAILROAD COMPANY V. RAY.

Supreme Court of Indiana. 1899.

152 Indiana, 392.

JORDAN, J.—The appellant railroad company owned and operated as one of its branches a railroad extending from the city of Detroit, Michigan, through Columbia City, Indiana, to the city of Peru, in the latter State. Appellee is the administratrix of William O. Ray, deceased, who was at and prior to his death in the employ of appellant as a brakeman on one of its local freight trains. He was accidentally killed while coupling cars at Columbia City, by catching his foot in an unblocked guard-rail, and while in such condition was run over by the car which he was attempting to couple.

To recover for this alleged negligent killing, the appellee successfully prosecuted this action in the lower court, and, upon a special verdict by the jury, obtained a judgment for \$5,000. The alleged errors of which appellant complains, in the main, are based upon the decision of the court in overruling a demurrer to the amended complaint, and in denying its motion for a judgment upon the special verdict of the jury, and in overruling its motion for a new trial.

We may, at least for the present, pass the consideration of the sufficiency of the complaint, for the reason that substantially the same facts, and the same theory thereunder, are disclosed by the special verdict, and if we can hold

that, under the facts therein found, appellee is entitled to a judgment, such holding will certainly result in sustaining the complaint. Counsel for appellant earnestly insist that their motion for a judgment in favor of appellant, upon the special verdict, ought to have been sustained. Preliminary to the consideration of this insistence, we may properly refer to some familiar and well settled rules applicable to a special verdict, one of which is that it is the very essence of such a verdict that it state all the material facts within the issues of the case, and no omission of a fact therein can be supplied by intendment. Its failure to find a fact in favor of the party upon whom the burden of establishing it rests is the equivalent of an express finding against him as to such fact. When the party having the *onus* in a case asks a judgment upon a special verdict, the material facts therein found, within the issues, must establish his right, under the law, to a judgment, otherwise he must fail in his demand; but where, as in this case, the moving party is not the one upon whom the burden of the issue rests, his right to be awarded a judgment does not depend alone upon the presence of material facts, but he may be entitled to the judgment by reason of the absence of some essential fact which it was incumbent upon his adversary to establish.

* * * * *

For the reasons stated, the facts set out in special verdict do not entitle appellee to a judgment against appellant.
* * * The judgment is reversed, and the cause remanded to the lower court, with instructions to sustain appellant's motion for judgment in its favor on the special verdict.

DARCEY V. FARMERS' LUMBER COMPANY.

Supreme Court of Wisconsin. 1894.

87 Wisconsin, 245.

Action for personal injuries. Plaintiff was an employee in defendant's sawmill, and had been such for about twenty days before the 15th day of July, 1891, when the injuries complained of occurred. He was twenty-three years of

age. His duty was to take edging and slabs from a certain line of rollers and put them on the "slashing" table, in which were a number of "slashing" saws; and when at work he stood in an alley between the slashing table and the said line of rollers. Near him was a large rotary saw, called the "cut-off" saw, which revolved vertically, and was hung at right angles with the line of rollers, and projected into the alley in which plaintiff worked, but with room to pass along the alley; and this saw was at all times running at a high rate of speed. * * * The negligence charged was in leaving the lower part of the saw uncovered.

The jury returned the following special verdict: * * *

Judgment for the plaintiff was entered on this verdict, and defendant appealed.

WINSLOW, J. * * *

* * * * *

In answer to the fifth question, the jury find that the dangers and risks from the exposed saw would be apparent to any person using ordinary care and observation in like situation with the plaintiff. This must include the risk from which the plaintiff's injury resulted, or else it is wholly irrelevant, and we so construe it. The question and answer, therefore, mean that the plaintiff was chargeable with knowledge of, and therefore assumed, the risk from which the accident resulted by remaining in the employment without objection. This is a form of contributory negligence. 2 Thomp. Neg. 1014, sec. 19; *Nadau v. White River L. Co.*, 76 Wis. 120-131. In answer to the sixth question, the jury find that there was no contributory negligence on the part of the plaintiff.

Now, the only ground upon which it was claimed that contributory negligence could be imputed to plaintiff was (as charged by the court) that he remained in the employment after he knew, or ought to have known, the risk which he incurred. This makes it very clear that the sixth question and answer amount to a finding that the plaintiff was not chargeable with knowledge of the risk. But we have seen that the fifth finding is a finding that he was chargeable with such knowledge. The direct contradiction between these two findings makes a judgment for the plaintiff on the verdict impossible, and a new trial must be had.

By the court.—Judgment reversed, and action remanded for a new trial.

BAXTER V. CHICAGO & NORTHWESTERN RAIL-
WAY COMPANY.

Supreme Court of Wisconsin. 1899.

104 Wisconsin, 307.

Action by an employe of defendant to recover compensation for personal injuries received by him by the explosion of a locomotive engine, claimed to have been caused by defendant's keeping it in use with knowledge, or reasonable means of knowledge, that it was defective to a degree which rendered such an accident among the natural and reasonable probabilities, and one which, in the exercise of ordinary care, it should have apprehended.

* * * * *

MARSHALL, J. The chief controversy on the trial was as to whether the defective condition of the boiler, which caused the explosion, ought to have been discovered by the defendant before that event, and guarded against. To cover that field by the special verdict, defendant's attorneys requested the court to submit for answers these four questions: "Could the defects have been discovered without removing the flues from such boiler?" "Was it the ordinary custom and practice among persons generally, using locomotive boilers of a like kind, under similar circumstances, to remove the flues for the purpose, only, of inspecting the shell of such boiler?" "Was the boiler of engine No. 249, up to the time it exploded, used, operated, treated, and inspected by the defendant in the manner usually and ordinarily followed by persons generally, who use, operate, treat, and inspect locomotive engine boilers of a like kind under similar circumstances?" "If you answer 'Yes' to question No. 10, did such use, operation, treatment, and inspection cause or reveal any defects which caused the injury to plaintiff?" Such questions were rejected and in lieu thereof, following the question of whether the boiler

was defective in fact and the nature of the defects, this question was submitted: "If you find in answer to question No 5 that the boiler was defective at the time of said explosion, then could the defendant company through its agents and servants, by reasonable and proper care, tests, or inspection, have discovered such defects before the explosion?" In connection with such question the jury were instructed as follows: "Reasonable care as used in this question means such care as ordinarily careful persons exercise under like circumstances, and reasonable tests and inspections mean such tests and inspections as are made and employed by ordinarily prudent persons engaged in the same business and under like circumstances." That ruling is assigned as error and it appears to be one of the chief grounds of complaint. Appellant's counsel do not contend but that the real fact in issue was, by the court's question as explained, placed before the jury for determination, but they contend that the right of defendant to a special finding as to every material fact in issue, stripped of all conclusions of law, was violated because the question required the application of legal definitions and explanations in order to enable the jury to properly answer it, the result being that the final conclusion embodied in the answer was rather a conclusion of law than one of fact; and in support of that a lengthy argument upon the character of a special verdict under the statute was presented.

It seems hardly necessary at this day to discuss questions so elementary as what constitutes a special verdict. It is a finding upon all the material issues of fact raised by the pleadings. A failure to distinguish between such facts and the numerous evidentiary circumstances which may be the subjects of controversy on the evidence and are relied upon to establish the ultimate facts upon which the case turns, often leads to unjust criticism of a special verdict. A conclusion is not one of law because it is reached by a process of reasoning from many primary circumstances. While such circumstances may be in dispute, the real question is, Do they lead with reasonable certainty to, and establish, the fact alleged by the pleading upon the one side and denied by the pleading upon the other? If the subject of the allegation in the complaint be one of law, or of mere evi-

dence, it has no proper place in the pleading, and hence no necessary place in the special verdict. By the complaint, certain facts are alleged to exist constituting the plaintiff's cause of action and warranting the remedy sought. Those facts, if put in issue by the answer, and controverted on the evidence, in case of a special verdict, must appear to exist thereby, or the conclusion of law must be against the plaintiff. The object of a special verdict is solely to obtain a decision of issues of fact raised by the pleadings, not to decide disputes between witnesses as to minor facts, even if such minor facts are essential to and establish, by inference or otherwise, the main fact. *Goesel v. Davis*, 100 Wis. 678; *Eberhardt v. Sanger*, 51 Wis. 72; *Jewell v. C., St. P. & M. R. Co.*, 54 Wis. 610; *Klochinski v. Shores L. Co.*, 93 Wis. 417; *Ward v. C., M. & St. P. R. Co.*, 102 Wis. 215. A strict compliance with this rule requires that the verdict be made up of sufficient questions to at least cover, singly, every fact in issue under the pleadings. If that could always be kept in view, the legitimate purpose of such a verdict in promoting the administration of justice would be uniformly accomplished, and the opinion entertained by some that its use is harmful would cease to exist.

Testing the ruling of the trial court by what has been said, it is free from any reasonable criticism. Neither of the questions which were refused called for a response to any issue raised by the pleadings. Each called for a finding as to some essential as a matter of law to, or bearing on the existence of, the main fact, each being, however, of a strictly evidentiary character. The real fact in issue was as to whether the condition of the boiler which caused the explosion ought to have been known to the defendant. The question submitted plainly covered that subject. The degree of care with which the defendant was chargeable was strictly a legal question. Whether that degree of care was exercised in the instance under consideration was strictly a question of fact. The instruction properly laid down the law for the guidance of the jury, and the question called for an answer as to whether the defendant came up to the legal standard in the particular instance. The jury were thus called upon to find the fact, not the evidence of the fact, leaving it to the court to apply thereto the proper legal principles. No doubt the finding of evidentiary facts is

sometimes helpful in tying the jury down to the precise question in controversy, by keeping before them the barriers they must overcome in order to reach the conclusion contended for by plaintiff; but so long as the ultimate question is properly one of fact, or of mixed law and fact properly pleadable as matter of fact, and essential to the cause of action upon which a recovery is sought, it is strictly the proper subject of a question, and those facts from which it is or may be inferable may properly be omitted.

The idea advanced by counsel for the defendant that the statutory right to a special verdict is only satisfied by questions that do not need to be considered in the light of legal principles given to the jury by the court, is contrary to the universal practice and the settled law upon the subject. Often, whether certain conduct complained of is negligence, where the evidentiary facts are all established, is a question of fact, in respect to which different minds may reasonably come to different conclusions. In that situation it is necessary to carefully instruct the jury regarding the standard of care necessary to the performance of the duty alleged to have been violated, leaving it to them to determine whether the alleged wrongdoer came up to the legal standard in the particular instance complained of. The question of contributory negligence, of proximate cause, and what is reasonable, are only, ordinarily, determinable by viewing evidentiary facts in the light of legal principles. The ultimate fact being only properly determinable by viewing evidentiary facts in the light of legal standards, instructions by the court in regard to such standards are necessary. When such ultimate facts are established, the legal liability follows as a conclusion of law. At that point the jury should not be instructed. They are to find the facts, guided by the law regarding such facts, but regardless of the legal effect of their conclusions. The issues of fact raised by the pleadings are to be passed upon by the jury. The legal conclusion to be drawn from such findings is to be referred to the court with an additional conclusion by the jury, express or implied, that if the court should be of the opinion, upon the whole case, as found, that plaintiff has a good cause of action, they find for the plaintiff, otherwise for the defendant. *Suydam v. Williamson*, 20 How. 427.

* * * Further, it is proper, and on request it is error to refuse, to give instructions requested as to each question submitted, that may be reasonably necessary to enable the jury to answer it intelligently and according to the law governing the subject. But no instructions as to the effect of an answer upon the ultimate rights of the parties is proper. *Ryan v. Rockford Ins. Co.*, 77 Wis. 611; *Ward v. C., M. & St. P. R. Co.*, 102 Wis. 215.¹

* * * * *

¹ *General instructions on the law of the case are never proper where the jury are required to return a special verdict. Stayner v. Joyce* (1889) 120 Ind. 99, 22 N. E. 89.

JUDGMENT NOTWITHSTANDING THE VERDICT.

PLUNKETT V. DETROIT ELECTRIC RAILWAY
COMPANY.*Supreme Court of Michigan. 1905.**140 Michigan, 299.*

MONTGOMERY, J. Plaintiff, a city fireman, was pipeman on a hose truck, which was proceeding west on High street at 7:45 p. m., February 2, 1900, when it was struck at Hastings street by a north-bound Hastings street car belonging to defendant. Plaintiff was thrown and injured. Plaintiff brought this action to recover for the injuries sustained, and on the trial, under a charge submitting the question of defendant's negligence, and that of the contributory negligence of the plaintiff, to the jury, a verdict was rendered in favor of the plaintiff for \$2,500. Defendant thereupon entered a motion for judgment in its favor *non obstante veredicto*, for the reasons:

"*First.* For that under the evidence given in said cause a verdict should have been directed by the court in favor of the defendant at the conclusion of the trial thereof.

"*Second.* For that this court charged said jury, in substance and effect, that the said plaintiff by and through the persons with whom he was riding, was guilty of contributory negligence."

This motion was granted, and judgment *non obstante veredicto* was entered for defendant. Plaintiff brings error.

The defendant and the court below mistook the practice at the common law, judgment *non obstante veredicto* could be entered only when the plea confessed the cause of action and set up matters in avoidance which were insufficient, although found true, to constitute a defense or bar to the action. The rule was later relaxed, and made to apply in favor of the defendant, so that it is now generally held that the defendant is entitled to a judgment *non obstante vere-*

dicto when the plaintiff's pleadings are not sufficient to support a judgment in his favor. 11 Enc. Pl. & Prac. 912 et seq. So, too, if there be both a general and special verdict, and the latter be inconsistent with the former, judgment may, in some cases, be based upon the special verdict, disregarding the general verdict. But we know of no case in which it is proper practice to enter a judgment *non obstante veredicto*, unless it appears on the *record* that the verdict of the jury cannot be supported as matter of law. In all other cases the proper practice is to move for a new trial, or review the case on writ of error and exceptions. There must be either a general or special verdict to support a judgment, or the pleadings must authorize its entry. This question is ruled by *Central Sav. Bank v. O'Connor*, 132 Mich. 578. See also, *Schmid v. Village of Frankfort*, 134 Mich. 619, and *County of Montmorency v. Putnam*, 135 Mich. 111. Counsel for appellant has presented the case upon the assumption that the circuit court had power to consider the question which he assumed to passed upon, and has pointed out that the court mistook the rule as to imputed negligence, and that his holding is at variance with the ruling of this court in *McKernan v. Railway Co.*, 138 Mich. 519.

Defendant's counsel contend that there are other reasons why the verdict should have been for the defendant. We must decline to enter upon a consideration of these questions.

The judgment is reversed, and the case will be remanded, that the plaintiff may move for judgment on the verdict. Plaintiff will recover costs.

MOORE, C. J., and GRANT, BLAIR, and OSTRANDER, JJ., concurred.

FLOYD V. COLORADO FUEL & IRON COMPANY.

Court of Appeals of Colorado. 1897.

10 Colorado Appeals, 54.

BISSELL, J., delivered the opinion of the court.

George Floyd was employed in the converting mill of the Colorado Fuel & Iron Company, and was a foreman in

charge of one of its cupolas. He had under him three men. Their duties were to attend to the cupolas, withdraw the molten iron and distribute and care for the slag or refuse which rose to the surface of the iron after it was melted. This slag or refuse was drawn off through what is termed a cinder notch or tap hole in the cupola and through a runner. These runners are half circular troughs of iron, about eight feet long and weigh in the neighborhood of seven or eight hundred pounds. They are fastened on to the cupola by a collar. The runners last for a considerable time unless the molten iron rises too high and flows into them. This will eat them out and necessitate their replacement. This was the condition of one of the runners in charge of Floyd in June, 1893. It was observed by Crow, the superintendent of the converting mill. Douglass was a machinist in charge of repairs and was sent by Crow to put in a new runner. When he came up with some helpers, he called on Floyd and his men to assist him in the work. While doing it Floyd was injured. The runner slipped, fell on his foot, mashed it, and he was disabled for a long time to do his usual work or any other which compelled him to be on his feet. There is very considerable dispute between Floyd and Crow respecting the terms of the order and the obligations and duties of the parties, but according to the view which we take of the present record and of the judgment which was entered, we are not concerned with these details or with the discrepancies in the testimony of the witnesses. Floyd brought this suit against the company to recover damages. The case went to trial and resulted in a verdict in his favor for \$1,250. The defendant company moved for a nonsuit at the conclusion of the plaintiff's case, and a direction to the jury to find a verdict for the defendant when the testimony was closed. Both motions were denied. Afterwards the company filed a motion for a new trial and a motion for judgment *non obstante veredicto*. This term is used because it was so denominated by the mover, and in terms was an application for judgment dismissing the action notwithstanding the verdict of the jury, although the grounds of it remove it entirely from that class of motions. It was wholly based on considerations foreign to such applications, and its eight several grounds as specifically stated, were rested on parts and portions of the testimony,

and on it as a whole the defendant attempted to maintain the right to a judgment in its favor notwithstanding the verdict because from the evidence sundry and divers facts appeared which would bar a recovery. It was granted and the court entered judgment for the defendant. This judgment and order of the court is the only error assigned and therefore the only one which will be considered.

In support of the assignment, the plaintiff insists that a judgment *non obstante veredicto* may not be entered on the motion of the defendant. Many cases are cited to this proposition and they uniformly support it. It is urged to the contrary that the rules, proceedings, and practice which prevailed at the common law are inapplicable under the code, which can alone be looked to, to ascertain whether the defendant may make such a motion and obtain relief which was formerly granted in like cases, wherein application was made by one entitled to present it. We do not regard the question as an open one. We discover in a case which was not called to our attention that this question has been set at rest by an authoritative decision of the supreme court rendered since the code went into effect, and the practice is settled by that case. *Quimby v. Boyd et al.*, 8 Colo. 194.

Therein the court holds that this motion may not be made by the defendant, nor can he obtain relief of an analogous character otherwise than by one in arrest of judgment. Since this is true, it must be conceded that the result sought could not be secured by this procedure. The liberality which pervades the code practice, and the purpose and intent of the legislature to require the courts to disregard errors of an unsubstantial character and to affirm judgments which do not affect the substantial rights of the parties, compel us to consider another question which may be regarded as collateral to the first. This is whether the motion can be considered as one in arrest of judgment. But this reaches only those defects which are apparent on the face of the record and which are not cured by a verdict or saved by a failure to demur, and which do not require the consideration of matters not apparent in the record proper, nor dependent on testimony for their solution. We have been able to find no exceptions to this rule. 1 Black on Judgments, Sec. 98; *Commonwealth v. Watts*, 4 Leigh, 672; *Sanner v. Sayne*, 78 Ga. 467; *Brown*

v. Lee, 21 Ga. 159; *Balliett v. Humphreys*, 78 Ind. 389; *Sedgwick v. Dawkins*, 18 Fla. 335; *Hardesty v. Price*, 3 Colo. 556.

The evidence is no part of the record for the purposes of such a motion. For this reason no argument to support it can be predicated on the theory that the evidence is insufficient to warrant the recovery. *Bond et al. v. Dustin*, 112 U. S. 604.

The motion does not attack the sufficiency of the complaint as a statement of a cause of action nor is there any other defect in the record pointed out or adverted to in the argument by which the judgment of the court below can be sustained, or which could in any event be deemed sufficient to support a motion in arrest of judgment. Since the motion is neither one *non obstante veredicto* nor in arrest, and can be supported on neither hypothesis, there is no way known to the practice by which the defects or deficiencies in the case made by the proof can be reached, except by a motion for a new trial. The code distinctly provides that wherever the evidence is insufficient to support the verdict, the court shall have full power to set it aside and grant a new trial. It is an easy and a swift remedy, available to the parties and within the power of the court. That which was made and the judgment which was entered does not accord with the practice which must prevail in such cases. Under our system this was an action for the recovery of damages, and as such, was triable only by jury. If the court refuses to nonsuit the plaintiff or to direct a verdict for the defendant, the case must go to the jury and the issues be determined by them. If their conclusions are unsatisfactory, or the court deems them unsupported by the evidence, it has full power to set the verdict aside, but only one course can be pursued. The issues must be resubmitted to another jury. It is the right of the plaintiff as well as of the defendant to have questions of fact settled in the mode provided by law. We know of no way save by the consent of parties whereby a suit to recover damages can be otherwise tried.

* * * * *

The court erred in entering the judgment, and it will therefore be reversed.

Reversed.

CRUIKSHANK V. ST. PAUL FIRE & MARINE
INSURANCE COMPANY.

Supreme Court of Minnesota. 1899.

75 Minnesota, 266.

MITCHELL, J.

This was an action to recover upon a "hail insurance policy," one provision of which was that,

"In case of loss by hail to the crops insured, the assured shall mail a written notice to the company at its office in the city of St. Paul, Minn., within forty-eight hours after the time of such loss, stating the day and hour of the storm, also the probable damage to each part of the crops insured."

So far as material for the purposes of this appeal, the defense was that the insured had not given notice of loss in accordance with this provision of the policy.

The policy contained a warranty that the insured was the owner of all the land upon which the crops covered by the policy were growing, but a breach of this warranty, if any, was a matter of defense, and no such defense was pleaded.

When the evidence closed the defendant moved the court to direct a verdict in its favor, but the court denied the motion and submitted the case to the jury, which found a verdict in favor of the plaintiff. Thereupon the defendant made a motion, not in the alternative for judgment notwithstanding the verdict, or, in case that should be denied, for a new trial, but merely for judgment notwithstanding the verdict. The court denied the motion, and from the judgment entered upon the verdict the defendant appealed.

Originally at common law, judgment notwithstanding the verdict could only be granted in favor of the plaintiff, the remedy in favor of the defendant being to have the judgment arrested; but either by statute or by judicial relaxation of this rule, judgment notwithstanding the verdict became quite generally allowable in favor of either party. But in either case the motion was based on the record alone, and the granting or denying it depended

upon the pleadings. The rendition of judgment notwithstanding the verdict was discretionary with the court. It would only be granted when it was clear that the cause of action, or the defense, put upon the record did not, in point of substance, constitute a legal cause of action or defense. It was never granted on account of any technical defect in the pleadings, but in such case the court would order a replader.

By enacting laws 1895, c. 320,¹ the legislature was not creating a new remedy, but merely extended, as has been done in many other states, the common law remedy to cases where, upon the evidence, either party was clearly entitled to judgment. In thus extending the remedy it must be presumed that the legislature intended it to be governed by the same rules which applied when it was granted upon the record alone; that is, that it should not be granted unless it clearly appeared from the whole evidence that the cause of action, or defense, sought to be established could not, in point of substance, constitute a legal cause of action or a legal defense.

The court has acted on this construction of the statute and refused to order judgment even where there was a total absence of evidence on some material point, but where it appeared probable that the party had a good cause of action or defense, and that the defect in the evidence could be supplied on another trial. This is just such a case.

From the record it appears probable that the plaintiff has a good cause of action and that the defects, if any, in the evidence, are largely technical and could be supplied on another trial. The alleged defects in the evidence suggested are of the following character: that the letter from plaintiff's father to Kenaston was not formally introduced in evidence, that there was no evidence that the

¹ The statute is as follows: "In all cases where at the close of the testimony in the case tried a motion is made by either party to the suit requesting the trial court to direct a verdict in favor of the party making such motion, which motion was denied, the trial court on motion made that judgment be entered notwithstanding the verdict, or on motion for a new trial, shall order judgment to be entered in favor of the party who was entitled to have a verdict directed in his or its favor; and the supreme court of the state on appeal from an order granting or denying a motion for a new trial in the action in which such motion was made may order and direct judgment to be entered in favor of the party who was entitled to have such verdict directed in his or its favor whenever it shall appear from the testimony that the party was entitled to have such motion granted."

letter from Kenaston to the defendant was never mailed, and that there was no evidence that the person who came to adjust the loss was McClure, or that McClure was at that time defendant's adjuster. The statute permits a party to make his motion in the alternative. Defendant has elected not to do so, but to stand exclusively on its right to judgment in its favor notwithstanding the verdict against it. Not being entitled to this relief, it is not entitled, at least as a matter of right, to a new trial on the ground of the insufficiency of the evidence. Indeed, counsel for the defendant conceded this upon the argument.

Judgment affirmed.

CHAPTER XVI.

ARREST OF JUDGMENT.

SECTION 1. FOR WHAT DEFECTS?

PELICAN ASSURANCE COMPANY V. AMERICAN FEED AND GROCERY COMPANY.

Supreme Court of Tennessee. 1909.

122 Tennessee, 652.

MR. CHIEF JUSTICE BEARD delivered the opinion of the Court.

* * * * *

In the case at bar errors are assigned upon the action of the trial judge in admitting over objection incompetent testimony, in overruling a motion for peremptory instruction, in giving certain instructions to the jury, and failing to grant requests that were submitted. It will be observed that these errors if committed, occurred in the trial of the cause, and would have constituted grounds of a motion for a new trial, made in the court below, to the end that a retrial might be obtained, or, failing in this, then to preserve the same in the record, so that the ruling of the trial judge in declining the motion might be preserved to the plaintiff in error. *Railroad v. Johnson*, 114 Tenn. 633, 88 S. W. 169. Resting upon matters extrinsic to the technical record, they could only be preserved for review in this court by a properly filed bill of exceptions. If, as is contended by counsel for plaintiff in error, they can here be made the subject of investigation, by reason of the motion in arrest having been overruled, then we can see no distinction between that and a motion for new trial; for the very errors that are now made the subject of complaint are those which would have been properly raised on this latter motion. It is apparent that, to secure a reversal on account of these errors, it would be necessary to look beyond the "face of the record" into the evidence introduced. This cannot be done. It is well settled by the

authorities that a motion in arrest of judgment lies alone for some error which vitiates the proceeding, or is of so serious a character that judgment should not be rendered. It "can only be maintained for a defect upon the face of the record, and the evidence is no part of the record for this purpose." *Bond v. Dustin*, 112 U. S. 604, 5 Sup. Ct. 296, 28 L. Ed. 835; *Van Stone v. Stillwell E. T. C. Co.*, 142 U. S. 128, 12 Sup. Ct. 181, 35 L. Ed. 961; 23 Cyc. 825.

Applying this rule of correct procedure to the present case, it follows that the judgment must be affirmed.

GRAY V. COMMONWEALTH.

Supreme Court of Appeals of Virginia. 1895.

92 Virginia, 772.

RIELY, J., delivered the opinion of the court.

* * * * *

After the jury had rendered their verdict the prisoner moved the court in arrest of judgment, on the ground that one of the jurors was incompetent; which motion the court overruled. It appears from the bill of exceptions that the juror, when examined on his *voir dire*, suggested himself that he might not be competent to serve, as he was deputy sheriff when the killing took place, which was more than two years prior to the trial, and had the warrant for the arrest of the prisoner, but, on being fully examined by the court, answered that he made no arrest and had not formed or expressed any opinion as to the guilt or innocence of the prisoner, and could give him a fair and impartial trial. He was thereupon accepted by the court as a juror, without objection from either side. The prisoner claimed that he had discovered, after the jury was sworn, that the said juror had not only the warrant for his arrest, but also, with a number of other persons, had pursued him for some days, and had several times visited the neighborhood in search of him. It is not the province of a motion in arrest of judgment to correct an error like the one alleged. That lies only to cor-

rect an error that is apparent on the face of the record. *Commonwealth v. Stephen*, 4 Leigh, 679; *Watt's Case*, *Id.* 672; Bishop on Cr. Pro. (3d ed.), sections 1282 and 1285; and 4 Minor's Institutes (3d ed.) Pt. I, 939. The ground of the objection nowhere appears in the record. This bill of exceptions was not, therefore, properly taken. But even if the proper proceedings had been resorted to, the statement set forth in the bill of exceptions, which is not supported by the affidavit of the prisoner or any one else, did not disqualify the juror or furnish ground for a new trial, and certainly not when the objection was not brought to the attention of the court until after the verdict. *Bris-tow's Case*, *supra*.

* * * * *

The judgment of the Circuit Court must be affirmed.
Affirmed.

HUBBARD V. RUTLAND RAILROAD COMPANY.

Supreme Court of Vermont. 1907.

80 Vermont, 462.

ROWELL, C. J. Case for negligently injuring the plaintiff by a collision of trains, on one of which he was a passenger. Plea, the general issue, and trial by jury. Verdict and judgment for the plaintiff. The defendant conceded the right of recovery, but denied the claim for damages, both in character and extent, in manner and form alleged.

* * * * *

The defendant moved in arrest, for that "the verdict is largely based on facts not in issue under the declaration and concessions of the defendant made on trial and accepted by the plaintiff, and varies materially from the issue made on trial, and finds facts foreign to such issue, and is for for entire damages, without discrimination between facts made material and immaterial by the issue, and is insufficient."

It is conceded that when the motion goes to defects in

the pleadings, an inspection of the record alone is to govern, and that the evidence cannot be looked into. But it is contended that when the motion goes to defects in the verdict, as this motion does, the rule is different; that the verdict is a part of the record, but any defect in it is not apparent on its face; that it is not a pleading, and if a motion in arrest will lie for defects in it, it follows that it must be looked into to discover those defects, and that this necessitates an examination of the evidence upon which it rests.

That a judgment may be arrested for defects in the verdict is clear. But a motion for that purpose stands like a motion in arrest for defects in the pleadings, and like that, must be tested by what appears on the face of the record, of which the verdict is a part. Mr. Gould says, in speaking of Lord Mansfield's disapprobation of the rule, that when there are good and bad counts, and a general verdict for the plaintiff for entire damages, without discriminating between the counts, no rule appears to be more clearly warranted by the original principles of the law than that the judgment, which is only an interference of law from the facts ascertained upon the record, must always be formed from the face of the record itself, and from that alone; and as the jury must be presumed to know nothing of the sufficiency or the insufficiency of counts, the conclusion seems perfectly just, in legal theory, that the damages are as likely to have been assessed in whole or in part on the bad count as on the good count. Gould's Pl. c. X, sec. 58, n. (7).

Mr. Tidd says that the only ground for arresting judgment at this day is, some matter intrinsic, appearing on the face of the record, that would render the judgment erroneous and reversible; for though it seems to have been otherwise formerly, yet it is now settled that judgment cannot be arrested for extrinsic or foreign matter not appearing on the face of the record, but that courts are to judge upon the record itself, that their successors may know the grounds of their judgment. 2 Tidd's Pr. *(918). * * *

The defendant contends, as we have seen, that if the testimony cannot be looked into when the verdict does not show the defect on its face, there can be no remedy in such

a case by motion in arrest. And that is true if, as here, if anywhere, the defect appears only in the testimony, for that is not a part of the record, and the court must judge *upon* the record, and upon that alone. But the verdict being a part of the record, if the record as a whole shows the defect, it is enough. And it will show it, and must show it, if it is a defect that the law recognizes as ground for a motion in arrest. Thus, if the verdict varies substantially from the issue, as if, instead of finding the matter in issue, the jury finds something foreign to the issue, the judgment must be arrested, for the court cannot tell for which party judgment should be rendered. Here the verdict does not show the defect on its face, but taken with the rest of the record, which shows what the issue was, the record as a whole shows the defect on *its* face. The same is true when the verdict finds only part of the matter in issue, omitting to find either way another material part. These instances are sufficient to show how defects in a verdict not apparent on its face are made to appear for the purposes of a motion in arrest.

Judgment affirmed.

BULL V. MATHEWS.

Supreme Court of Rhode Island. 1897.

20 Rhode Island, 100.

TILLINGHAST, J. This is a motion in arrest of judgment on the ground of a misjoinder of causes of action. The action is trespass on the case for trover and conversion, and the declaration contains a count in trover and conversion, and also the ordinary counts in assumpsit. At the trial of the case in the District Court a decision was rendered in favor of the plaintiff for \$19.10 and costs; but there is nothing in the record to show whether the judgment was based on the count in trover and conversion, or on those in assumpsit. No plea was filed in the case, but as the defendant entered an appearance the general issue is deemed to be filed. Gen. Laws R. I., cap. 237, sec.

3. But whether, in this case the general issue as to the count in trover, which would be not guilty, or as to the counts in assumpsit, which would be non assumpsit, is in, we have no means of determining. Within five days after the rendition of said decision the defendant filed his motion in arrest of judgment in the District Court, whereupon the case was certified to this court.

It is a familiar rule of common-law pleading that counts sounding in tort cannot properly be joined with counts sounding in contract, and also that such misjoinder is fatal, not only on demurrer, but also on motion in arrest of judgment. Ency. Pl. & Pr. vol. 2, p. 803, and cases cited; *Haskell v. Bowen*, 44 Vt. 579. The effect of such misjoinder is clearly expressed in Chit. Pl. 9 Am. ed. 206, as follows: "The consequences of a misjoinder are more important than the circumstances of a particular count being defective; for in a case of misjoinder, however perfect the counts may respectively be in themselves, the declaration will be bad on demurrer or in arrest of judgment, or upon error. See also Gould's Pl. cap. 4, sec. 87, and cases cited.

The ordinary test for determining whether different causes of action may be joined is to inquire whether the same plea may be pleaded and the same judgment given on all the counts of the declaration; and unless this question can be answered in the affirmative the counts cannot be joined. See *Drury v. Merrill*, ante, 2. See also *Court of Probate v. Sprague*, 3 R. I. 205.

Applying this test to the case at bar, it will at once be seen that there is a fatal misjoinder. If the pleader in this case had simply omitted to strike out the money counts which are printed in the writ, perhaps we might disregard them; but as he has filled them out in the ordinary way where the case is assumpsit, we feel bound to presume that he intended to rely thereon, as well as on the count in trover.

It is true that, since the case was certified to this court, the plaintiff's counsel has filed an affidavit setting forth that by reason of mistake and oversight he neglected to strike out the money counts, and also that at the trial in the District Court, the evidence introduced was confined to the count in trover, which was the only count relied on.

But as a motion in arrest of judgment raises only those objections which are apparent upon the record; *State v. Paul*, 5 R. I. 189; Black on Judgments, vol. 1, Secs. 96-8; and as the affidavit forms no part of the record, we are not at liberty to consider it.

Judgment arrested.

PITTSBURGH, CINCINNATI, CHICAGO & ST. LOUIS
RAILWAY COMPANY V. CITY OF CHICAGO.

Appellate Court of Illinois. 1908.

144 Illinois Appellate, 293.

MR. PRESIDING JUSTICE THOMPSON delivered the opinion of the court.

This is an action in case begun the 16th day of May, 1895, in the Circuit Court of Cook county, Illinois, by the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company against the city of Chicago to recover three-fourths of the damages sustained by it on account of the destruction of property of which "the plaintiff was possessed as of its own property," during riots there in July, 1894.

* * * * *

The action is based upon a statute of this state providing as follows:

"That whenever any building or other real or personal property except property in transit, shall be destroyed or injured in consequence of any mob or riot composed of twelve or more persons, the city, or if not in a city then the county in which such property was destroyed, shall be liable to an action by or in behalf of the party whose property was thus destroyed or injured for three-fourths of the damages sustained by reason thereof.

* * * * *

"No person or corporation shall be entitled to recover in any such action if it shall appear on the trial thereof that such destruction or injury of property was occasioned or in any way aided, sanctioned or permitted by the carelessness, neglect or wrongful act of such person or corpora-

tion; nor shall any person or corporation be entitled to recover any damages for any destruction or injury of property as aforesaid, unless such party shall have used all reasonable diligence to prevent such damage.

* * * * *

“No action shall be maintained under the provisions of this act, by any person or corporation whose property shall have been destroyed or injured as aforesaid, unless notice of claim for damages be presented to such city or county within thirty days after such loss or damage occurs and such action shall be brought within twelve months after such destruction or injury occurs, * * *”

It is urged the motion in arrest of judgment should have been sustained because the declaration is insufficient in that it does not state a cause of action by failing to state facts but only stating conclusions in several particulars. It is argued (1) “that ownership is not alleged as a conclusion nor by way of uncertain or incomplete statement, by way of argument, by evasion, nor is there any allegation from which it can necessarily be inferred. All that is alleged is possession;” (2) “that the declaration should locate the mob as within the city of Chicago;” (3) the statute “requires that such party shall have used all reasonable diligence to prevent such damage,” while the declaration only avers that the injury was not occasioned through any neglect on the part of the plaintiff to use reasonable diligence to prevent such injury; (4) that “the declaration does not aver that a notice of plaintiff’s claim for damages was presented to the city within thirty days after the destruction or damage to its property occurred.”

The numerous alleged defects in the declaration which have been presented for our consideration are purely formal. The defects complained of could not have been reached by a general demurrer. They could only have been grounds for a special demurrer assigning the causes. A judgment after verdict can only be arrested for substantial faults. All defects which would not have been fatal on a general demurrer are cured by pleading to the issue, and are aided by verdict. When the pleading states the essential requisites of a cause of action, the court will presume that the particular fact or circumstance which appears to be defectively or imperfectly stated or omitted

was proved at the trial. A defective or inaccurate statement of a cause of action is cured by a general verdict but where no cause of action is stated a verdict will not cure the defect. Gould on Pl., chap. X.

Counsel for appellant state in their original argument (p. 21): "The declaration states the name of the plaintiff. It states that 'said plaintiff was possessed as of its own property,' of the railway equipment, etc., described and claimed to have been injured or destroyed, and for which judgment is asked. It also avers 'that the property of the plaintiff was destroyed or injured.' These averments only amount to an assertion that the plaintiff *was the owner* of the property mentioned and that the legal title was in the plaintiff. Such an averment is only a mere statement of a conclusion of law and amounts to nothing as an averment." At common law the possessor of personal property is *prima facie* the owner of the property. The averments that "plaintiff was possessed as of its own property," and "the property of the plaintiff was destroyed or injured," amount to an allegation of ownership by the plaintiff, when the declaration is first questioned after verdict. *Beigen v. Riggs*, 34 Ill. 170. On a motion in arrest of judgment "every intendment will be indulged in favor of the declaration, and if it contains terms sufficiently general to comprehend by fair and reasonable intendment any matter necessary to be proved, and without proof of which the jury could not have given the verdict, the want of an express averment in the declaration has been cured by the verdict." *Danley v. Hibbard*, 222 Ill. 88; *Fountain Head Drain Dist v. Wright*, 228 Ill. 208. We hold that the conclusion to be drawn from the averments of the declaration is that the plaintiff is the owner of the property destroyed or injured.

The declaration avers that "within the territorial limits of the city of Chicago, aforesaid, in consequence of a certain mob or mobs, riot or riots, each of which was then and there composed of twelve or more persons within the territorial limits of said city of Chicago, a large quantity," etc. This language locates the mob within the city of Chicago in the language of the statute and fully answers the second reason urged in arrest of judgment.

We do not think it necessary to comment on the third

and fourth reasons urged in arrest of the judgment further than to state that under the rule announced in *Danley v. Hibbard*, *supra*, the allegations contained in the declaration concerning these matters are sufficiently general to comprehend by fair and reasonable intendment the matters necessary to be proved in the respects complained of, and the court did not err in overruling the motion.

* * * * *

*Affirmed.*¹

¹ The same rule applies to matters in abatement. They cannot be availed of on motion in arrest. *Huger v. Cunningham* (1906) 126 Ga. 684, 56 S. E. 64; *Hawkins v. Hughes* (1882) 87 N. C. 115.

SECTION 2. TIME FOR MAKING MOTION.

CHICAGO AND ALTON RAILROAD COMPANY V. CLAUSEN.

Supreme Court of Illinois. 1898.

173 Illinois, 100.

MR. JUSTICE CARTWRIGHT delivered the opinion of the court:

Appellee brought this suit against appellant to recover damages for injuries alleged to have been sustained by the starting of a train on which he was a passenger, while he was attempting to get off at appellant's station at Gardner, Illinois. There was a judgment for appellee, which has been affirmed by the Appellate Court.

It is argued at much length that the trial court improperly overruled a demurrer to the first original count and five amended counts of the declaration upon which the case finally went to trial. No error has been assigned upon such ruling on the demurrer, either in the Appellate Court or this court, and none could be so assigned for the reason that after the demurrer was overruled the defendant pleaded the general issue and thereby raised an issue of fact, which was tried. It has always been the rule in this State that if a party wishes to have the action of a court

in overruling his demurrer reviewed in this court he must abide by the demurrer. By pleading over he waives the demurrer and the right to assign error upon the ruling. * * *

Defendant made a motion in arrest of judgment, which was overruled, and that is assigned for error; but having once had the judgment of the court on its demurrer it could not again invoke it for the same reasons by motion in arrest. After a judgment overruling a demurrer to a declaration there can be no motion in arrest of judgment on account of any exception to the declaration that might have been taken on the argument of the demurrer. *Rouse v. County of Peoria*, 2 Gilm. 99; *Quincy Coal Co. v. Hood*, 77 Ill. 68; *American Express Co. v. Pinckney*, *supra*; *Independent Order of Mutual Aid v. Paine*, 122 Ill. 625.¹

While the defendant, by pleading over, waived its demurrer and the right to assign error upon the ruling of the court on the demurrer, it did not waive innate and substantial defects in the declaration which would render the declaration insufficient to sustain a judgment, and the question whether it is so far defective may be considered under the assignments of error. The question which may be thus presented is not as broad as those questions which may be raised by demurrer, for the reason that defects in pleading may sometimes be aided by the pleadings of the opposite party, or be cured by the Statute of Amendments and Jeofails, or by intendment after verdict. The objections made to the various counts of the declaration are, that the statements therein are too general and indefinite in failing to show how the starting of the train operated to throw plaintiff from it and in what manner it was started, and that the various counts allege certain duties on the part of the defendant, and charge the neglect and violation of other duties, and the doing of other acts foreign to the duties so alleged, as the cause of the sup-

¹ This is the orthodox rule, and seems to be based on no better reason than that suggested in the following quotation from Tidd: "After judgment on demurrer, there can be no motion in arrest of judgment, for any exception that might have been taken on arguing the demurrer; the reason is, that the matter of law having been already settled, by the solemn determination of the court, they will not afterwards suffer anyone to come as *amicus curiae*, and tell them that the judgment which they gave on mature deliberation is wrong; but it is otherwise after judgment by default, for that is not given in so solemn a manner." 2 Tidd's Practice, *918.

posed injuries. So far as the declaration is defective in the respects complained of, the defendant's plea of the general issue, of course, could not aid or supply any omission or informality therein. It is also true that the Statute of Amendments and Jeofails does not extend to cure defects which are clearly matters of substance. It provides that judgment shall not be reversed for want of any allegation or averment on account of which omission a special demurrer could have been maintained, but it does not protect a judgment by default against objections for matter of substance. Many such objections, however, have always been cured, at the common law, by a verdict. At the common law, independently of any statute, the rule was and is, "that where there is any defect, imperfection or omission in any pleading, whether in substance or form, which would have been a fatal objection upon demurrer, yet if the issue joined be such as necessarily required, on the trial, proof of the facts so defectively or imperfectly stated or omitted, and without which it is not to be presumed that either the judge would direct the jury to give or the jury would have given the verdict, such defect, imperfection or omission is cured by the verdict." (1 Chitty's Pl. 673.) This rule was quoted and approved in *Keegan v. Kinnare*, 123 Ill. 280, and *Chicago and Eastern Illinois Railroad Co. v. Hines*, 132 id. 161. The intendment in such case arises from the joint effect of the verdict and the issue upon which it was given, and if the declaration contains terms sufficiently general to comprehend, by fair and reasonable intendment, any matter necessary to be proved, and without proof of which the jury could not have given the verdict, the want of an express statement of it in the declaration is cured by the verdict. Under this rule a verdict will aid a defective statement of a cause of action, but will never assist a statement of a defective cause of action. (1 Chitty's Pl. 681.) Where the declaration and the issue joined upon it do not fairly impose the duty on the plaintiff to prove the omitted fact, the omission will not be cured, (*Joliet Steel Co. v. Shields*, 134 Ill. 209), and if, with all the intendments in its favor, the declaration is so defective that it will not sustain a judgment, such defects may be taken advantage of on error. (*Wilson v. Myrick*, 26 Ill. 34; *Schofield v. Settley*, 31 id. 515; *Chicago and*

Eastern Illinois Railroad Co. v. Hines, supra; Culver v. Third Nat. Bank, 64 Ill. 528.) * * *

When these rules are applied to the declaration in this case, we are satisfied that, although not very well drawn, it is clearly sufficient to sustain the judgment. * * *

* * * * *

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

NEWMAN V. PERRILL.

Supreme Court of Indiana. 1880.

73 Indiana, 153.

ELLIOTT, J. The questions presented by this appeal arise upon the ruling of the court sustaining the appellee's motion in arrest of judgment.

* * * * *

Appellant argues that, as the court had overruled demurrers to the complaint, it could not afterwards rightfully sustain a motion in arrest. We do not think that the court, by ruling wrongly upon the demurrers, precluded itself from afterwards ruling rightly upon the motion in arrest. If, when the motion was presented, the court deemed the complaint so clearly bad as not to be sufficient to sustain a judgment, it was right to arrest the proceedings at that stage, notwithstanding the fact that at an earlier stage the court had entertained a different opinion.

A complaint fatally defective is vulnerable to attack, even upon appeal, and there can certainly be no error in declaring a fatally defective complaint bad on motion in arrest, although demurrers may have been previously overruled. It is the duty of the court not to permit a judgment to be entered upon a complaint which is so clearly insufficient as to afford the judgment no foundation. There can be no valid judgment without a sufficient complaint, and, where a party's complaint is incurably bad, he cannot justly complain of any ruling which prevented him from obtaining a judgment based upon it.

* * * * *

Judgment affirmed.¹

¹ To the same effect see *Turnpike Co. v. Yates* (1901) 108 Tenn. 428, 67 S. W. 69; *Field v. Slaughter* (1808) 1 Bibb. (Ky.) 160; *Griffin v. The Justices* (1855) 17 Ga. 96. In Iowa this practice is expressly authorized by statute. *Frum v. Keeney* (1899) 109 Ia. 393, 80 N. W. 507.

KELLER V. STEVENS.

Court of Appeals of Maryland. 1886.

66 Maryland, 132.

YELLOTT, J., delivered the opinion of the court.

The appellee instituted proceedings in the Circuit Court for Baltimore County, to enforce a mechanics' lien. * * *

* * * * *

* * * On the 17th day of April, 1886, judgment was extended in favor of plaintiff for \$389.92, with interest from date, and costs, and on the same day judgment *fiat executio* was entered on motion of plaintiff's attorney. On the 20th of April, 1886, after final judgment had thus been entered, the appellant filed a motion in arrest of judgment. The motion was overruled and from this determination of the court below an appeal has been taken.

There can be no doubt that, if a motion in arrest had been made subsequently to the judgment by default and antecedently to the entry of final judgment, the motion would have been strictly in conformity with regular procedure. * * *

But this motion in arrest was filed after the rendition of a final judgment. It therefore comes too late. What judicial action is invoked by the interposition of a motion in arrest? The party presenting the motion asks the court not to enter final judgment because of some supposed defect in the proceedings which he undertakes to make apparent. But the judgment having been already entered, if he wishes to have it removed from the record, he must endeavor to accomplish that result by a motion to strike out.

But the record shows that this appeal is from the decision of the court below overruling a motion in arrest of judgment filed after a final judgment had been entered in

the cause. There was no error committed by the Circuit Court in the disposition which it made of the motion, and its ruling should be affirmed.

Ruling affirmed.

SECTION 3. EFFECT OF MOTION.

STATE EX REL. HENRY W. BOND V. FISHER.

Supreme Court of Missouri. 1910.

230 Missouri, 325.

[On January 16, 1904, Sallie Bond filed a suit against the relator, Henry W. Bond, in the circuit court of St. Louis, upon a foreign judgment rendered against him in the state of Tennessee. Henry W. Bond filed defenses to this action, and on June 21, 1907, the cause came on for trial. The court made a finding against the defendant, Henry W. Bond, whereupon, at the same term, he filed his motion in arrest of judgment, which motion was continued, and thereafter, on June 22, 1908, said motion was sustained, for the stated reason that the judgment was not responsive to the issues. Neither party took any steps to appeal from or review this order of the trial court. Nothing further was done for a year, when the said cause was set for trial for the 5th day of October, 1909. Relator at once filed a motion to strike the cause from the docket, on the ground that the order in arrest of judgment had put an end to the cause, which motion was overruled. Relator then filed a petition in the Supreme Court for a writ of prohibition restraining the Hon. D. D. Fisher, judge of the circuit court of St. Louis, from proceeding further with said cause. A preliminary rule was issued requiring respondent to show cause why a permanent writ of prohibition should not issue.]¹

WOODSON, J. This is an original proceeding instituted in this court, seeking to prohibit the respondent, as judge of the circuit court of the city of St. Louis, from taking and further exercising jurisdiction over the parties to and

¹ The matter inclosed in brackets is a condensation by the editor of the statement of facts published with the opinion.

the subject-matter involved in the case of Sallie Bond against this relator, pending therein.

* * * * *

I. There are but two legal propositions presented by this record for determination: First, what is the legal effect of an unappealed from order of the circuit court of this State sustaining a motion in arrest of judgment; and, second,

* * *

We will dispose of these propositions in the order stated.

At common law an unconditional order sustaining a motion in arrest of judgment was a final disposition of the cause, that is, it prevented the rendition of a subsequent final judgment therein. But, if the order was made conditional upon an amendment, or such other action as would remove the cause of arrest, and the condition complied with, then a *venire facias de novo* should be awarded, in which case the order in arrest would not constitute a bar to the entry of a final judgment therein.

In Cyclopedia of Law and Procedure, vol. 23, p. 836, the doctrine is stated thus: "The granting of a motion in arrest of judgment prevents the entry of a final judgment in the cause, unless it is made conditional upon an amendment, or such other action as will remove the cause of arrest. And if it does not award a *venire facias de novo*, it operates as a discontinuance and dismisses defendant without day."

In Encyclopedia of Pleading and Practice, vol. 2, p. 820, the rule is stated in this language: "In civil cases the sustaining of a motion in arrest of judgment has the effect of putting an end to the case."

The rule is tersely and clearly stated by the Supreme Court of Pennsylvania in the case of *Butcher v. Metts*, 1 Miles 233, in the following language:

"An arrest of judgment is in effect nothing more than superseding a verdict for some cause apparent upon the record, which shows that the plaintiff is not entitled to the benefit of the verdict. It is often followed by a judgment for the defendant, that he go without day, but it is not of itself a judgment for the defendant. The court may, after an arrest of judgment, award a repleader or a *venire de novo* without a repleader. Which of these courses is the proper one, depends upon the nature of the defect for which

the judgment is arrested. If it appears by the record that the plaintiff has no cause of action, the court will give judgment, after the arrest of judgment on the verdict, that the plaintiff take nothing by his writ, and that the defendant go without day. If issue be joined upon an immaterial point, there being a sufficient cause of action alleged in the declaration, the proper course is to award a repleader. If the pleadings be sufficient and the issue well joined, but the verdict is imperfectly found, it is usual to award a *venire de novo*; and this it is said may be done upon the motion of the defendant, without a motion in arrest of judgment.

“The *venire de novo* is an ancient proceeding of the common law. It was in use long before the practice of granting new trials. It follows, of course, upon the granting of a new trial; but as a distinct proceeding it is commonly adopted after a bill of exceptions or after a special verdict imperfectly found, but always for some cause apparent on the record, and if granted when it should not be, it is error, and the award of it may be reversed.

“A new trial, on the other hand, is commonly granted after a general verdict for some cause not apparent on the record, and it is not assignable for error. (*Hambleton v. Veere*, 2 Saund. 169 (n. 1); *Goodtitle v. Jones*, 7 T. R. 43, 48; *Witham v. Lewis*, 1 Wils. 48, 56; Com. Dig., tit. Pleader, R. 18; 1 Sellon’s Practice, ch. 11, sec. 3 (C. D.); *Miller v. Ralston*, 1 Serg. & Rawle 309; *Ebersoll v. Krug*, 5 Binn. 53; *Lessee of Pickering v. Rutty*, 1 Serg. & Rawle 515.)

“In this case the fault was in the verdict. Of course it appears upon the record. A *venire facias de novo* is therefore proper.

“In regard to the objection that the defendant is no longer in court on this action, it should be observed that the judgment was arrested at this term, and no judgment has been entered for the defendant. He is therefore still in court and bound to take notice of the further proceedings in the cause. But if the term had been allowed to elapse after the arrest of judgment, and the cause had not been continued by a *curia adv. vult*, according to strict notions of practice, the action would have been discontinued, and the defendant without day in court. *Venire de novo* awarded.”

And the Supreme Court of Indiana in the case of *Raber v. Jones*, 40 Ind. l. c. 441, in discussing this question used this language: "The complaint does not aver that the judgment against the corporation was recovered upon the policy. It is a clear principle of pleading, that in declaring upon a statute, the averments must be sufficient to bring the case within the statute. The complaint was, therefore, radically defective, in not stating facts sufficient to constitute a cause of action, and the court properly arrested the judgment.

"When the judgment was arrested, however, there should have been an end of the case. No judgment for the defendant should have followed. The arrest of judgment ends the case. Each party pays his own costs, and the plaintiff is at liberty to proceed *de novo* in a fresh action. 3 Bl. Com. 393, note u."

The case of *Kauffman v. Kauffman*, 2 Wharton (Pa.) 139, 1 c. 147, announces the same doctrine.

The authorities seem to be uniform upon this proposition. The only modification that has been made of that common law rule is contained in section 804, Revised Statutes 1899. That section reads as follows: "When a judgment shall be arrested, the court shall allow the proceedings in which the error was, to be amended in all cases when the same amendment might have been made before trial, and the cause shall again proceed according to the practice of the court."

Under the provisions of this statute, the order of the court sustaining a motion in arrest of judgment does not necessarily result in a new trial, any more than it did at common law. Such an order has that effect only in those cases where the motion is sustained for an error which could have been cured by an amendment made before the trial occurred. This was so held by this court in the case of *Stid v. Railroad*, 211 Mo. l. c. 415, where LAMM, J., in speaking for the court, used this language: "Speaking with precision, a motion in arrest is not a motion for a rehearing. If granted, it does not necessarily result in a new trial. If an amendment be allowed, the cause by statutory command proceeds 'according to the practice of the court.' (R. S. 1899, sec. 804.)"

This construction of that statute is in harmony with the

spirit of our legislation upon the subject of nonsuits and arrests of judgments, as expressed in section 4285, Revised Statutes 1899, which, insofar as is material, reads as follows: "If any action shall have been commenced within the time respectively prescribed in this chapter, and the plaintiff therein suffer a nonsuit, or, after a verdict for him, the judgment be arrested, or, after a judgment for him, the same be reversed on appeal or error, such plaintiff may commence a new action from time to time, within one year after such nonsuit suffered or such judgment arrested or reversed."

The only remaining matter to be determined in this connection is, was the motion in arrest sustained for an error which might have been cured by a timely amendment before the trial was had in the circuit court of the city of St. Louis? The order sustaining the motion in arrest specifically sets out the reason for the court's actions in that regard, namely, for the reason that the *judgment was not responsive to the issues*. Clearly, this was not an error which could have been cured by an amendment before the trial was had in the circuit court of the city of St. Louis, within the meaning of said section 804, for the obvious reason that the judgment could not in the very nature of things have been rendered until after the trial was had therein. And since the order of the court sustaining the motion in arrest was unconditional, unappealed from, and the term at which it was entered having long ago elapsed, it became absolute and final, and, therefore, constitutes a complete bar to all further proceedings in said cause.

* * * * *

We are of opinion that the preliminary rule heretofore issued should be made permanent.

It is so ordered. All concur.

CINCINNATI, INDIANAPOLIS, ST. LOUIS AND CHICAGO RAILWAY COMPANY V. CASE.

Supreme Court of Indiana. 1889.

122 Indiana, 310.

COFFEY, J. This was an action by the appellee against the appellant to recover damages for negligent delay in shipping appellee's cattle from the town of Fowler to the city of Indianapolis.

* * * * *

Upon issues formed the cause was tried by a jury, who returned a verdict for the appellee.

Appellant moved in arrest of judgment, which was overruled, and an exception taken.

Appellant then filed its motion and reasons for a new trial, which was overruled and exception reserved. Judgment on verdict.

The first and second errors assigned here call in question the sufficiency of the complaint, and the third questions the propriety of the ruling of the circuit court in overruling the motion for a new trial.

* * * * *

No objection to the ruling of the circuit court in overruling the motion in arrest of judgment is urged in this court. It is not even assigned here as error.

It is now claimed by the appellee that as the motion in arrest of judgment preceded the motion for a new trial, the right to move for a new trial was cut off, and that it cannot, for that reason, be considered. Such seems to be the established practice in this state. * * *

It is claimed by the appellant that no good reason can be given for the rule established by these numerous cases, and that therefore, they should be overruled. But it must not be forgotten that they establish a rule of practice which has prevailed in this State for many years, well understood by the profession. A rule so firmly established and so well understood as this should not be disturbed, except for some strong reason. The rule can work no hardship, as a party may, after a motion for a new trial, move in arrest of judgment and thus secure the benefit of both

motions. We know of no good reason why this long list of cases should be overruled. We find no error in the record.

*Judgment affirmed.*¹

¹ "This rule, however, extends only to cases where the party has knowledge of the fact, at the time of moving in arrest of judgment; therefore, a new trial was granted after such a motion, on affidavits of two of the jury, that they drew lots for their verdict. (Pr. Reg. 409. Bul. Ni. Pri. 325, 6. *See quaere*, whether such affidavits would now be received.)" 2 Tidd's Practice, *913.

JEWELL V. BLANDFORD.

Court of Appeals of Kentucky. 1838.

7 Dana, 472.

Opinion of the Court, by CHIEF JUSTICE ROBERTSON.

* * * * *

First, did the previous motion in arrest of judgment preclude Jewell from a right to ask a new trial? and, secondly, was he entitled to a new trial?

First. Cases may, we know, be found in the British books, in which judges in England decided that a motion for a new trial comes too late after an unsuccessful motion to arrest the judgment; and the only reason given for such a practice seems to have been that assigned by Bayley, justice; and that is because, as he said, by moving to arrest the judgment, the party acknowledged that there was no valid objection to the verdict. But that assumption is, in our judgment, unreasonable, and the estoppel deduced from it seems to be equally so.

If it be true that a motion in arrest is an implied waiver of a right to a new trial, should not a motion for a new trial equally operate as an implied admission that there is no cause for arresting the judgment? And considered as an original question, is there, should there be, any such implied admission or waiver in either case? We think not. Indeed, in England this is a mere matter of *practice* only, and arose in England, from the peculiar organization and powers of its courts. There is no *principle* in it.

Our practice is different, and is, therefore, in our opinion,

more consonant with justice and all the ends of the law.

We do not hesitate, therefore, to decide that the motion for a new trial did not come too late in this case, and the more especially as, by not objecting to it when made, the plaintiff in the action waived the technical objection which the British practice, if it had been adopted here, might have authorized him *then only* to make.

* * * * *

CHAPTER XVII.

NEW TRIALS.

SECTION 1. GENERAL PURPOSE.

GUNN V. UNION RAILROAD COMPANY.

Appellate Division of the Supreme Court of Rhode Island. 1901.

23 Rhode Island, 289.

ROGERS, J.—This suit is trespass on the case for negligence brought in the Common Pleas Division, wherein, upon a jury trial, the plaintiff obtained a verdict against the defendant for \$10,000; and thereupon the defendant brought it to this Division on a petition for a new trial on the ground, among others, that the verdict was against the law and the evidence and the weight thereof. On December 28, 1900, this Division filed its opinion granting the petition on the ground that the verdict was against the weight of the evidence. See 22 R. I. 321. On the same day, to wit, December 28, 1900, the plaintiff moved that this Division dismiss the defendant's petition for a new trial and direct the Common Pleas Division to enter judgment on the verdict of the jury in said action,—

“First. Because the record in said case shows that to grant a new trial on the grounds therein set forth would be in violation of the constitution of Rhode Island, and also of the constitution of the United States, to wit, of the fourteenth amendment to said constitution of the United States, wherein it is provided that no state shall ‘deprive any person of life, liberty or property, without due process of law.’

“Second. Because the court in its opinion has ‘granted the defendant's petition for a new trial’ on grounds which the record shows deprive the plaintiff of his right to a trial by jury, and of his property, ‘without due process of law.’ ”

At the time our State constitution went into operation section 5 of "An act to establish a Supreme Judicial Court" was in full force, which gave that court the power to grant new trials in cases decided therein or in any Court of Common Pleas for various reasons specified; and said section contained this clause, viz.: "and the said court shall also have power to grant new trials in cases where there has been a trial by jury, for reasons for which new trials have been usually granted at common law." Digest of 1822, p. 109.

It is clear that our ancestors prior to our present State constitution found trial by jury so fallible that it was necessary to provide for more than one trial. In England as well as in the older States of America, two hundred years ago, trial by jury was in a state of evolution. The old law of attaints against a jury as a means of reversing a verdict against the evidence was apparently obsolete both in England and in this country before the American Revolution. Note to *Erving v. Cradock*, Quincey, 560, by Horace (Mr. Justice) Gray.

Sir William Blackstone, writing in or about 1765 (3 Com. Chitty's ed., 388-392), says: "Formerly the principal remedy, for reversal of a verdict unduly given, was by writ of attaint. * * * But such a remedy as this laid the injured party under an insuperable hardship by making a conviction of the jurors for perjury the condition of his redress. The judges saw this; and therefore very early, even upon writs of assise, they devised a great variety of distinctions, by which an attaint might be avoided, and the verdict set to rights in a more temperate and dispassionate method. * * * When afterwards attaints, by several statutes, were more universally extended, the judges frequently, even for the misbehaviour of jurymen, instead of prosecuting the writ of attaint, awarded a second trial: and subsequent resolutions, for more than a century past, have so amplified the benefit of this remedy, that the attaint is now as obsolete as the trial by battle which it succeeded; and we shall probably see the revival of the one as soon as the revival of the other. * * * If every verdict was final in the first instance, it would tend to destroy this valuable method of trial, and would drive away all causes of consequence to be decided according to the forms of imperial

law, upon depositions in writing, which might be reviewed in a course of appeal. * * * The jury are to give their opinion *instanter*; that is, before they separate, eat, or drink. And under these circumstances the most intelligent and best intentioned men may bring in a verdict, which they themselves upon cool deliberation would wish to reverse.

“Next to doing right, the great object in the administration of public justice, should be to give public satisfaction. If the verdict be liable to many objections and doubts in the opinion of his counsel, or even in the opinion of bystanders, no party would go away satisfied unless he had a prospect of reviewing it. Such doubts would with him be decisive: he would arraign the determination as manifestly unjust, and abhor a tribunal which he imagined had done him an injury without a possibility of redress.

“Granting a new trial, under proper regulations, cures all these inconveniences, and at the same time preserves entire and renders perfect that most excellent method of decision, which is the glory of the English law. A new trial is a rehearing of the cause before another jury, but with as little prejudice to either party, as if it had never been heard before. * * * * *

“Nor is it granted where the scales of evidence hang nearly equal; that which leans against the former verdict ought always very strongly to preponderate.”

Bright v. Eynon, 1 Burr. 390, decided in the King's bench in 1757, was a motion for a new trial upon which the judges gave their opinion, granting the new trial, *seriatim*. Lord Mansfield, *inter alia*, said, page 393,—“Trials by jury, in civil causes, could not subsist now without a power, somewhere, to grant new trials. If an erroneous judgment be given in point of law, there are many ways to review and set it right. Where a court judges of fact upon depositions in writing, their sentence or decree may, many ways, be reviewed and set right. But a general verdict can only be set right by a new trial; which is no more than having the causes more deliberately considered by another jury, where there is a reasonable doubt, or perhaps a certainty, that justice has not been done.

“The writ of attaint is now a mere sound in every case: in many it does not pretend to be a remedy. There are

numerous causes of false verdicts, without corruption or bad intention of the jurors. They may have heard too much of the matter before the trial, and imbibed prejudices without knowing it. The cause may be intricate; the examination may be so long as to distract and confound their attention. * * * * *

“If unjust verdicts obtained under these and a thousand like circumstances, were to be conclusive forever, the determination of civil property, in this method of trial, would be very precarious and unsatisfactory. It is absolutely necessary to justice, that there should upon many occasions, be opportunities of reconsidering the cause by a new trial. * * * * *

“It is not true ‘that no new trials were granted before 1655,’ as has been said from *Style*, 466.”

After referring to *Slade's case*, which was in 1648, reported in *Style*, 138, and to *Wood v. Gunston*, in 1655, *Style*, 466, Lord Mansfield proceeds: “The reason why this matter cannot be traced further back is, ‘that the old report-books do not give any accounts of determinations made by the court upon motions.’

“Indeed, for a good while after this time, the granting of new trials was holden to a degree of strictness, so intolerable, that it drove parties into a court of equity, to have, in effect, a new trial at law, of a mere legal question, because the verdict, in justice, under all the circumstances, ought not to conclude; and many bills have been retained upon this ground, and the question tried over again at law, under the direction of a court of equity. And therefore of late years the courts of law have gone more liberally into the granting of new trials, according to the circumstances of the respective cases. And the rule laid down by Lord Parker, in the case of the *Queen against the corporation of Helston*, H. 12 Ann B. R. (Lucas, 202) seems to be the best general rule that can be laid down upon this subject; viz. ‘Doing justice to the party,’ or in other words ‘attaining the justice of the case.’

“The reasons for granting a new trial must be collected from the whole evidence, and from the nature of the case considered under all its circumstances.”

Mr. Justice Denison concurring, added “that it would be difficult perhaps to fix an absolutely general rule about

granting new trials, without making so many exceptions to it as might rather tend to darken the matter than to explain it; but the granting a new trial, or refusing it, must depend upon the legal discretion of the court, guided by the nature and circumstances of the particular case, and directed with a view to the attainment of justice."

Mr. Justice Foster agreed to the propriety of what had been said, as to such cases in which the juries give verdicts against evidence, and even as to cases where there may be a contrariety of evidence, but the evidence upon the whole, in point of probability, greatly preponderates against the verdict; (which, depending on a variety of circumstances, is matter of legal discretion, and cannot be brought under any general rule;) but in all cases where the evidence is nearly *in equilibrio*, he declared that he should always think himself bound to have regard to the finding of the jury, for "*ad questionem facti respondent juratores.*"

Other cases in which new trials were granted in England prior to the American Revolution, are *Berks v. Mason*, Sayer, 264, decided in 1756; *Goodtitle v. Clayton*, in 1768, 4 Burr. 2224; and *Norris v. Freeman*, in 1769, 3 Wil. 38. In *Marsh v. Bower*, 2 Black. W. 851, heard in 1773, the action was for words spoken, and the words were fully proved on the trial, but the jury found for the defendant. The court refused a new trial solely on the ground of triviality, declaring "that they would not grant a new trial for the sake of sixpence damages, in mercy to the plaintiff as well as the defendant."

The authorities above cited satisfy us that, at the time of the separation of the American colonies from the mother country, the common law of England authorized the granting of a new jury trial, in a proper case, on the ground that the former verdict was against the weight of the evidence. In this State the decisions of this court, as well those denying, as those granting a new trial, recognize that the granting of a new trial upon a strong preponderance of testimony has been the long-established rule. See *Johnson v. Blanchard*, 5 R. I. 24; *Patton v. Hughesdale*, 11 R. I. 188; *Watson v. Tripp*, 11 R. I. 98, 103; *Chafee v. Sprague*, 15 R. I. 135; *Sweet v. Wood*, 18 R. I. 386; *Lake v. Weaver*, 20 R. I. 46.

For a large number of cases in other States upon the

proposition that when a verdict is clearly against the weight of the evidence, it is the duty of the court to set it aside and order a new trial, see 16 A. & E. Enc. of Law (1st ed.), 554, note 7.

The plaintiff in the case at bar contends that it was an essential provision of the common law that motions for new trials should be addressed to the trial court. One judge, however, as we understand it, went upon circuit, and the judges in banc sat upon motions for a new trial, and though the opinion of the judge that sat on the jury trial was listened to with much respect, yet it was not final; otherwise there would have been no reason for the others sitting and going through the idle form of expressing their opinion as they were wont to do. Reference to the old cases hereinbefore cited seems to show that. In *Marsh v. Bower, supra*, the report of the case says: "Lord Mansfield, who tried the cause on the Home Circuit, reported," &c., but "The court unanimously declared," etc.

* * * * *

In 16 A. & E. Enc. of Law (1st ed.), 618, is the following statement, viz.: "In the absence of statute regulations, the general rule is that an application for a new trial must be addressed to the court in which the cause was tried, and under circumstances rendering it necessary, it may be made to the judge who presided at the trial, during vacation. This rule is particularly applicable, and of nearly universal application in case of motions for new trial for errors of fact. Where a judge dies or goes out of office, however, his successor may entertain the motion, and where a cause has been transferred from one district to another by a change of lines or otherwise, such a motion may be heard by the proper tribunal in the new district, while power to entertain such motions has been conferred by statute in many and perhaps all of the states upon courts other than those in which the trial took place, in cases and under circumstances and conditions differing greatly in the different states."

In 3 Waterman on New Trials, 1214, is this statement, viz.: "Notwithstanding, however, the evident want of qualification of the Appellate Court to form a correct opinion as to the conformity of the evidence with the verdict, in this country it is generally permitted to exercise a discretion in the premises."

Our statute provides that a new trial by jury may be granted "for reasons for which a new trial is usually granted at common law." We have already expressed the opinion that the verdict's being against the weight of the evidence was a common-law reason at the time of the adoption of our State constitution; but while *reasons* are prescribed, methods of procedure are not, and it seems to us utterly unreasonable to try to stretch the application of the word *reasons*, to methods of procedure, so that in the lapse of years, reaching it may be to centuries, no change, or development, or improvement, no adaptation to altered conditions or circumstances, can be made or permitted without making unconstitutional the very same reasons that are still being adhered to.

Granting a new trial is exercising a discretion, and, with us, as in many other States, is a power not confided to a single justice. The exercise of that discretion, when depending upon the weight of the evidence, necessitates some knowledge of the evidence, and in this State that knowledge is furnished by a stenographic report of the evidence—questions, answers, and rulings—typewritten out at length, made by a sworn officer of the court and verified by the allowance of the justice presiding at the jury trial, or, if that be not possible, then verified by affidavit. In this way all the judges have equal opportunities of judging of the evidence, and are not dependent upon the prejudices or peculiarities of any one man; and, as they will not grant a new trial because of the verdict being against the weight of the evidence, unless it is against a clear and decided preponderance thereof, if they have any question in the matter they will invariably sustain the verdict. Though the justice presiding at a jury trial has some opportunity, perhaps, of weighing the evidence, that other justices have not, yet he is also subjected to greater probability of having prejudices awakened, so that in some states the disadvantages are deemed to outweigh the advantages of his sitting on a petition for a new trial, and, in this State, it is provided by statute, that "no justice shall sit in the trial of any cause * * * in which he has presided in any inferior court, or in any case in which the ruling or act of such justice sitting alone or with a jury is the subject of review, except by consent of all the parties." Gen. Laws R. I. cap. 221, s 4.

* * * * *

In *Missouri v. Lewis*, 101 U. S. 22, 31, Mr. Justice Bradley, delivering the opinion, said: "The Fourteenth Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two states separated only by an imaginary line. On one side of this line there may be a right of trial by jury, and on the other side no such right. Each state prescribes its own modes of judicial proceeding."

In *Brown v. Levee Commissioners*, 50 Miss. 468, the Supreme Court of Mississippi speaking of the meaning of the phrase "due process of law," uses these words which are quoted approvingly by Mr. Justice Matthews in *Hurtado v. California*, 110 U. S. 516, 536, viz.: "The principle does not demand that the laws existing at any point of time shall be irrevocable, or that any forms of remedies shall necessarily continue. It refers to certain fundamental rights which that system of jurisprudence, of which ours is a derivative, has always recognized. If any of these are disregarded in the proceedings by which a person is condemned to the loss of life, liberty, or property then the deprivation has not been by 'due process of law.'"

Judge Cooley in his work on Constitutional Limitations (6th ed.), 434, says: "The principles, then, upon which the process is based are to determine whether it is 'due process' or not, and not any considerations of mere form. Administrative and remedial process may be changed from time to time, but only with due regard to the landmarks established for the protection of the citizen."

* * * * *

In our opinion it is not necessary in order not to contravene the constitution either of this State or of the United States that the justice presiding at the jury trial should first pass upon the question whether the verdict is against the weight of the evidence, or that he should sit with the court required to pass upon that question, in granting a new trial for that reason.

We are of the opinion that this court has the constitutional right to grant a new trial in a civil case when in its opinion the verdict is against the weight of the evidence, and that granting such new trial in the case at bar, would

not be a violation of the constitution either of this State or of the United States. The plaintiff's motion, therefore, that this Division dismiss the defendant's petition for a new trial and direct the Common Pleas Division to enter judgment on the verdict of the jury in this action, is denied.

CALDWELL V. WELLS.

Supreme Court of Idaho. 1909.

16 Idaho, 459.

STEWART, J.—This is an action to foreclose a mechanic's and materialman's lien under the laws of this state. Upon the issues presented by the pleadings the court submitted certain interrogatories to a jury. The jury made answer to such interrogatories, and the answers were in favor of the defendant. The trial judge adopted the findings of the jury as the findings of the court and entered judgment in favor of the respondent. A notice of intention to move for a new trial was served as follows:

"Take notice, that plaintiff, J. W. Caldwell, intends to move the above-named court to vacate and set aside the judgment rendered in the above-entitled cause, and to grant a new trial of said cause, upon the following grounds, to wit:

* * * * *

"3. Insufficiency of the evidence to justify the judgment.

"4. That the judgment is against the evidence.

"5. That the judgment is against law.

* * * The motion for a new trial was overruled and the plaintiff appeals from the judgment and from the order overruling the motion for a new trial.

* * * * *

* * * An application for a new trial is directed to the verdict of the jury or the decision of the court. The verdict and the decision are supposed to be based upon the facts. The judgment is based upon the verdict, or the decision or findings of the court. If the verdict or findings of

the court do not support the judgment, the remedy is not by moving for a new trial. If, however, the verdict or decision of the court are not supported by the evidence, then the remedy is to move for a new trial and this requires a re-examination of the issue of fact. When a new trial is granted, the finding or verdict is set aside, in which case the judgment must also fall. In the case of *Boston Tunnel Co. v. McKenzie*, 67 Cal. 485, 8 Pac. 22, the court says of *Sawyer v. Sargents*.¹

“It was held that a motion for new trial cannot be based on the ground of the insufficiency of the evidence to justify the judgment, nor can it, says the court, be based on the ground that the judgment is against law. The motion should be directed at the decision, and not the judgment.”

* * * * *

Whether the judgment is authorized by the findings cannot be raised on the motion for a new trial, for it is not involved in a re-examination of the issues of fact; so in this case it was not error in the trial court to overrule the motion for a new trial, for the reason that counsel for appellant failed to specify the statutory grounds upon which such motion could be entertained. To have entitled the appellant to have the facts reviewed or have this court determine whether or not the trial court's decision was supported by the evidence, or against the evidence and the law, counsel should have specified in the notice of intention to move for a new trial such matters as grounds for granting a new trial. In other words, the motion should have been directed to the decision of the court, rather than the judgment. Whether the judgment is correct cannot be determined upon a motion for a new trial; whether the decision of the court as contra-distinguished from the judgment was correct, could have been determined upon motion for a new trial, had such matter been specified as a reason for granting such new trial. Of course in this case the failure to properly specify the insufficiency of the evidence, or that the decision was against law, would not have precluded the court from considering the other proper specifications contained in the notice, had there been anything in the record to support such grounds; but it is admitted by counsel for

¹ 65 Cal. 259, 3 Pac. 872.

appellant that the sole and only ground upon which a new trial could have been granted was the insufficiency of the evidence, and that the decision of the court was against the evidence and law, and as these grounds were not specified, the court committed no error in overruling the motion. * *

For these reasons the judgment is affirmed. Costs awarded to respondent.

SULLIVAN, C. J., and AILSHIE, J., concur.

ARMSTRONG V. WHITEHEAD.

Supreme Court of Mississippi. 1902.

81 Mississippi, 35.

WHITFIELD, C. J., delivered the opinion of the court.

Appellant sued appellee for \$144. In the course of the trial appellee, defendant below, reserved various exceptions to the action of the court in admitting and excluding evidence. So it was, however, that ultimately the judgment was rendered in favor of appellant, plaintiff below, for only \$59. Defendant below made no motion for a new trial, being satisfied with the result. Plaintiff below, dissatisfied with the amount of the recovery, made a motion for a new trial, which was overruled, and then brought the record to this court by appeal. Defendant below, finding plaintiff below had appealed, petitioned the circuit clerk for a cross-appeal and has here cross-assigned errors predicated upon the action of the court below in admitting and excluding evidence in the course of the trial, the court having overruled his objections, and he having excepted at the time. Appellant, plaintiff below, moves to dismiss the cross-appeal because the defendant below made no motion for a new trial.

In *Chastine's case*, 54 Miss. 503, following the statute prior to the code of 1892, §739, it was held that this court would not pass upon the action of the court below in overruling a motion for a new trial, where that particular action of the court had not been excepted to below, but the court, nevertheless, looked to the bill of exceptions, and the record, and for instructions improperly refused, and evidence im-

properly admitted, reversed the case. But, let it be marked, there was a motion for a new trial in that case, and the court below acted on that motion overruling it. In *Sprengler's case*, 74 Miss. 129 (s. c., 20 So. 879, s. c., 21 So. 4), the court pointed out the fact that § 739 of the code of 1892 changed the rule that this court would not pass on the action of the court below in overruling a motion for a new trial where such action in overruling the motion had not been excepted to. But, let it be marked again, there was in *Sprengler's case* a motion for a new trial, and a judgment of the court below overruling the motion. The important thing to note in *Chastin's case* and *Sprengler's case* is that in both the party appealing had specifically called the attention of the court below to the errors complained of, not simply by excepting in the course of the trial, but by repeating the exceptions in motions for new trials on which the court acted. It would be very unfair to the court below, for this court to pass upon errors assigned here for the first time, which had never been called to his attention in a motion for a new trial below. The object of the motion for a new trial, and the reason requiring it to be made and acted on in order that this court may review the action of the court below, is clearly set out in 14 vol. Ency. of Pl. and Pr., p. 846.

“*a. Generally.*—The office of a motion for a new trial is two-fold: first, to present the errors complained of to the trial court for review and correction, or to secure a new trial; second, to preserve the same errors in the record, so that the ruling of the trial court in granting or refusing a new trial may be reviewed by the appellate court. It is a general rule that all errors correctible by motion for a new trial and not so assigned are deemed to have been waived by the applicant for the new trial. Unless the motion for a new trial has been presented and considered by the lower court and its ruling preserved, the errors assigned in such motion will not be reviewed by the appellate court.

“*b. To Obtain Review by Trial Court.*—To secure a review in the trial court of errors committed at the trial, the complaining party must except to the errors and irregularities at the time when the ruling of the court thereon are made, and must call attention of the trial court to such rulings by assigning them as errors, and as grounds for a

new trial; otherwise such errors will be deemed waived.

“*c. To Obtain Review by Appellate Court.*—(1) *Necessity of Motion and Ruling Thereon.*—It is a well-known rule of appellate courts that errors of the trial court occurring during the trial will not be reviewed unless such errors have been called to the attention of the trial court, and an opportunity given to correct them. It is necessary, therefore, to present such error to the trial court by a motion for a new trial and to secure a ruling on the motion.”

And in *Thomp. on Trials*, sec. 2712:

“*Motion Necessary to Preserve Errors in the Record for Review.*—The motion is necessary to enable the court to correct such errors, occurring at the trial, as do not appear on the face of the record proper, as where it is insisted that there is no evidence to support the verdict, or that the verdict is against the law and the evidence, or that the evidence does not authorize the judgment, or that there is an error in the verdict of the jury, or where it is alleged that court erred in matter of law, either in admitting or rejecting evidence, or in giving or refusing instructions, or where it is alleged that there has been misconduct on the part of the jury, or that the damages assessed are inadequate, or excessive, or in a criminal case, for an alleged error because of the non-arraignment of the defendant. The grounds upon which the motion is to be made are expressly enumerated in a majority of the practice acts of the various States, and include generally such errors in the mode of trial as do not otherwise appear on the record, but which are proper matters of exception. And when no motion for a new trial is made in the trial court to correct such errors, most of the decisions hold that they are deemed to have been waived, and that the appellate court will refuse to review them.”

Judge Thompson properly calls attention to the distinction which exists in such cases between those exceptions which would appear upon the face of the record and which the judge would be supposed consequently to have always in mind, and the very different character of exceptions which are made in the current course of a trial and set forth in the ordinary bill of exceptions, and which do not appear elsewhere. Here we have a case in which it would have been very easy for the defendant to have put the record in such shape by making a motion for a new trial, and having the

court overrule it, as would have enabled him when the appellant brought the whole record here, to cross-assign error. The defendant did not choose to do that. He did not call the attention of the court below, as it was just he should have done, to the errors on which he finally relied, by setting them out in a motion for a new trial, and, of course, there being no such motion, the court below acted on no such motion. Unlike *Chastine's* and *Sprengler's* cases, the case contains no motion for a new trial at all on the part of the defendant below, and for reasons given in the authorities cited the motion will be sustained.

Cross-appeal dismissed.

STATE V. PHARES.

Supreme Court of Appeals of West Virginia. 1884.

24 West Virginia, 657.

JOHNSON, President: * * *

It is also assigned as error, that illegal evidence was admitted. The plaintiff in error cannot avail himself of this exception. He made no motion in the court below to set aside the verdict of the jury; and the court below as well as this Court may well suppose he was satisfied with the verdict. Had he moved to set aside the verdict, on the ground that the allegation and proof did not agree, it is very probable the court would have granted his motion. In a case tried by a jury no matter how many errors are saved, and exceptions taken to the ruling of the court during the trial, unless a motion is made to set aside the verdict, and that motion is overruled, all such errors saved will by the appellate court be deemed to have been waived. The rulings of the court during the trial are often necessarily hastily made, and if a motion is made for a new trial on the ground of erroneous rulings made at the trial, the court may at his leisure critically review his rulings, and, if convinced that they were erroneous, will correct them in the only manner he can by setting aside the verdict and granting a new trial, and thus save to the parties the expense of a writ of error.

It would be unfair to the trial-judge not to give him an opportunity to correct his rulings, if the exceptor is not satisfied with the verdict and intends to take his writ of error. The exceptions taken during the course of the trial are conditional. The exceptor will take advantage of them, provided he is not satisfied with the verdict. If dissatisfied, he will move to set it aside; and if his motion is overruled, he will except; but if satisfied, he makes no such motion, acquiesces in the verdict and waives his exceptions. He may be satisfied with the verdict at the time, for the reason that he would have no hope of changing it to his advantage by a new trial. It would certainly be unfair, in the absence of a motion to set aside the verdict, and after considerable time had elapsed, and the chief witnesses of his adversary dead, to permit him to have erroneous rulings during the trial reversed, after he had by his own action at the rendition of the verdict given his adversary to understand, that he acquiesced in the verdict. A new trial for errors committed during the trial can only be had after motion made in the court below and overruled, as this Court will not *ex mero motu* grant a new trial in case no such motion was made in the court below. (*Humphreys v. West*, 3 Rand. 516; *Miller v. Shrewsbury*, 10 W. Va. 115; *Riddle v. Core*, 21 W. Va. 530.) Of course it is different if the error is in the pleadings, as in such case there was a mistrial.

The judgment of the circuit court is affirmed with costs and damages according to law.

Affirmed.

DUBCICH V. GRAND LODGE ANCIENT ORDER OF UNITED WORKMEN.

Supreme Court of Washington. 1903.

33 Washington, 651.

Appeal from a judgment of the superior court for King county, MORRIS, J., entered March 13, 1903, upon the verdict of a jury rendered in favor of the plaintiff in an action upon a life policy in a mutual benefit society. Affirmed.

HADLEY, J. * * *

Respondent moves to dismiss the appeal on the ground that, as no motion for new trial was made, the judgment cannot, for that reason, be reviewed here. The errors specifically assigned, however, all involve rulings made by the trial court during the progress of the trial. The office of the motion for new trial, in its necessary relation to the appeal, is to give the trial court opportunity to pass upon questions not before submitted for its ruling such as misconduct of the jury, newly discovered evidence, excessive damages, error in the assessment of the amount of recovery, and similar questions. The motion seems to serve no necessary purpose, as far as concerns the review on appeal of questions once submitted to, and decided by, the trial court. It is true, if such questions are raised a second time, under the motion for new trial, the trial court may consider them, and may review its own rulings made at the trial to the extent of correcting them by granting a new trial. But such review by the trial court is not necessary in order that questions once actually decided by it in the cause may be considered on appeal. This court in effect so held in *Johnson v. Maxwell*, 2 Wash. 482, 27 Pac. 1071, and *Kennedy v. Derickson*, 5 Wash. 289, 31 Pac. 766. In the last named case the court said:

“The only effect which the failure to make such motion can have upon the proceedings in this court is to limit the questions which may be properly presented here.”

It is contended that those decisions were based upon § 450 of the Code of 1881, which provides that “the supreme court may review and reverse on appeal or writ of error any judgment or order of the district court, although no motion for a new trial was made in such court;” and it is urged that no such provision now exists in our statutes. Our attention has, however, not been called to any existing statute which affirmatively provides that the motion is necessary as a preliminary to the review on appeal of questions passed upon during the progress of the trial. We think, in the absence of such a statute, that the provisions of § 6520, Bal. Code, are broad enough to authorize the review of such questions here without a motion for new trial. We refer particularly to the following in said section:

“Upon an appeal from a judgment, the supreme court

may review any intermediate order or determination of the court below which involves the merits and materially affects the judgment appearing upon the record sent up from the superior court."

The motion to dismiss the appeal is denied.

SECTION 2. DISQUALIFICATION OF JURORS.

HARRINGTON V. MANCHESTER & LAWRENCE RAILROAD.

Supreme Court of New Hampshire. 1882.

62 New Hampshire, 77.

CASE, for personal injuries. After the trial, and a verdict for the defendants, the plaintiff moved to set the verdict aside because the foreman of the jury was an uncle of the defendants' treasurer, a stockholder in the corporation, and a witness on the trial. The juror was regularly drawn from a town in the county, and had been in attendance as a juror eight days before the trial. The juror understood that the defendants' treasurer was a stockholder. Motion denied.

ALLEN, J. It is repugnant to the natural sense of justice that one pecuniarily interested in the event of a trial, or related to either party to the cause, should decide, or take part in deciding, its merits. The preservation of confidence in jury trials, and of purity in the administration of justice, requires that jurors should be free from objections which are everywhere recognized as disqualifying, and that they should be "as impartial as the lot of humanity will admit." Bill of Rights, Art. 35. The smallest pecuniary interest in the result of a cause disqualifies a juror from sitting, and is a sufficient ground for a challenge for cause (*Page v. Contoocook Valley Railroad*, 21 N. H. 438; *Smith v. B. C. & M. Railroad*, 36 N. H. 458); and near relationship by blood or marriage to a party in interest has always been regarded as having the same effect. *Bean v. Quimby*, 5 N. H. 98; *Gear v. Smith*, 9 N. H. 63; *Sanborn v. Fellows*, 22 N. H. 473; *Moses v. Julian*, 45 N. H. 52, 56. The stockholder

of a corporation having for its object a dividend of profits, though not a party in a strict or technical sense when the corporation sues or is sued, is necessarily interested in the result of the proceeding, and is so far a party in interest as to come within the disqualifying rule; and neither he, nor his near kindred, would ordinarily be permitted to sit as a juror. *Page v. Contoocook Valley Railroad, supra; Smith v. B. C. & M. Railroad, supra; Moses v. Julian, supra; Quinebaug Bank v. Leavens*, 20 Conn. 87; *Place v. Butter-nuts Mfg. Co.*, 28 Barb. 503; *Ranger v. Great Western Railway Co.*, 5 H. L. Cas. 1854. The nephew of the foreman of the jury was not only a stockholder in the defendant corporation, but was also an important officer testifying in the case, and to some extent representing the defendants. He was so far identified in interest with the corporation, and known to the juror to be so, that the relationship was a disqualifying objection, and a sufficient cause for challenge.

It has not been the usual practice to disturb a verdict for a disqualification of one of the jurors rendering it, when the objection has not been taken until after verdict, and was known, or by reasonable diligence might have been known, to the party making it, before the trial or before verdict; and the burden of showing want of knowledge, and due diligence in discovering the objection, has, as a rule, been placed on the party moving for a new trial. In *Rollins v. Ames*, 2 N. H. 349, it was decided that the fact that a juror had, as a magistrate, taken the depositions of the witnesses of one party was good ground for a challenge, but objection was not made until after the verdict; and the verdict was not disturbed, because only one of the two attorneys for the excepting party made and submitted his affidavit that he was not aware of the objection before the verdict. It did not appear that the other attorney, or the party himself, was aware of the fact of legal incapacity in season to have taken advantage of it before verdict. In *State v. Hascall*. 6 N. H. 352, 360, the objection was that the juryman was drawn more than the required time of twenty days before court, and it was decided that it was too late to take the objection after verdict, on the ground that the party and his counsel had had opportunity to examine the venires and discover the irregularity before trial, and, failing to do this, the objection was waived. To the same effect are *Wilcox*

v. School District, 26 N. H. 303, where only one selectman was present at the drawing of jurors, and the irregularity did not appear in the return upon the venire, but only in the records of the town; *Bodge v. Foss*, 39 N. H. 406, 407, where the objection was, that the officers who attended to the drawing of jurors had not been chosen under a new organization of the town after its division by the legislature; and *Pittsfield v. Barnstead*, 40 N. H. 477, 497. In all these cases the objection was taken after verdict, and neither the parties nor their attorneys had knowledge of the objection at the time of trial. Having opportunity, and failing to seasonably examine the returns upon the venires and the records of the town, the objection could not prevail. In *State v. Daniels*, 44 N. H. 383, 385, the objection was, that the juror was prejudiced by previous conversation about the case, and it did not appear that the prejudice was not known to the respondent or his counsel before verdict, and a new trial was refused. In *Wassum v. Feeney*, 121 Mass. 93, the objection that a juror was an infant was not taken until after verdict; and though the fact of infancy was not known to the party or his counsel during the trial, it was decided that there had been sufficient opportunity to learn the fact, and make the objection at the time the jury was impanelled to try the case, and that objection after verdict came too late. In the opinion, it is said that the same rule applies to a juror disqualified by reason of interest or relationship; and *Jeffries v. Randall*, 14 Mass. 205, and *Woodward v. Dean*, 113 Mass. 297, are cited as authorities. Even in a capital case, application of the rule has been made to a juror not of the county or vicinage as required by the constitution. See anonymous case referred to in *Amherst v. Hadley*, 1 Pick. 38, 41, 42. In *Quinebaug Bank v. Leavens*, 20 Conn. 87, objection after verdict was made, that a juror was the father of a stockholder of the bank, and that the fact was not known to the defendant or his counsel before verdict. This was decided to be a sufficient ground for challenge, but the objection came too late, the defendant not having been diligent in inquiry to learn the fact before verdict.

The general rule derived from the cases is, that if the party has used reasonable diligence to ascertain the competency of a juror, and has failed to discover disqualifying

facts afterwards proved, and which might operate to his prejudice in the trial, the verdict will be set aside; otherwise not. Proffat's note to *Rollins v. Ames*, 9 Am. Dec. 79, 82. It does not appear, from any facts in the case, that the plaintiff used diligence in discovering the relationship of the juror to a stockholder of the defendants, and the motion to set the verdict aside was properly denied.

*Judgment on the verdict.*¹

CLARK, J., did not sit: the others concurred.

1 GROUNDS FOR NEW TRIAL.

Sections 2-8 of this chapter deal with various grounds upon which new trials may be granted. For the purpose of affording a convenient basis of reference for the study of these cases, the following summary is given of the common law grounds and of the statutory enactments of the various states dealing with the grounds for granting new trials.

Common Law. Tidd enumerates the common law grounds for new trial as follows: 1. Want of due notice of trial; 2. Material variance between the issue or paper-book delivered and the record of nisi prius; 3. Want of a proper jury; 4. Misbehaviour of the prevailing party, towards the jury or witnesses; 5. Unavoidable absence of attorneys or witnesses, or the discovery of new and material evidence since the trial; 6. Perjury of witnesses on whose testimony the verdict was obtained; 7. Misdirection of the judge, or the admission or exclusion of evidence contrary to law; 8. Error or mistake of the jury in finding a verdict without or contrary to evidence; 9. Misbehaviour of the jury in casting lots for their verdict; 10. Excessive damages. 2 Tidd's Practice, *903.

Alabama:

No statutory enumeration of grounds.

Arizona: Rev. St. 1901, sec. 1472.

"New trials may be granted and judgments may be set aside or arrested on motion for good cause on such terms and conditions as the court shall direct."

Arkansas: Kirby's Digest, 1904, sec. 6215.

"1. Irregularity in the proceeding of the court, jury or prevailing party, or any order of the court, or abuse of discretion, by which the party was prevented from having a fair trial.

2. Misconduct of the jury or prevailing party.

3. Accident or surprise, which ordinary prudence could not have guarded against.

4. Excessive damages, appearing to have been given under the influence of passion or prejudice.

5. Error in the assessment of the amount of recovery, whether too large or too small, where the action is upon a contract, or for the injury or detention of property.

6. That the verdict or decision is not sustained by sufficient evidence, or is contrary to law.

7. Newly discovered evidence, material for the party applying, which he could not with reasonable diligence, have discovered and produced at the trial.

8. Error of law occurring at the trial, and excepted to by the party making the application."

California: Code Civ. Pro., sec. 657.

"1. Irregularity in the proceedings of the court, jury, or adverse party, or any order of the court, or abuse of discretion by which either party was prevented from having a fair trial.

2. Misconduct of the jury; and whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by a resort to the determination of chance, such misconduct may be proved by the affidavit of any one of the jurors.

3. Accident or surprise, which ordinary prudence could not have guarded against.

4. Newly discovered evidence material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial.

5. Excessive damages, appearing to have been given under the influence of passion or prejudice.

6. Insufficiency of the evidence to justify the verdict or other decision; or that it is against law.

7. Error in law, occurring at the trial and excepted to by the party making the application."

Colorado: Code Civ. Pro., Sec. 256.

Same as the California statute, with term "referee" added under 1st ground, and the words "or inadequate" inserted before damages under 5th ground.

Connecticut: Practice Act, sec. 815.

"The superior court, court of common pleas, district court of Waterbury, and any city court, may grant new trials of causes that may come before them respectively, for mispleading, the discovery of new evidence, want of actual notice of the suit to any defendant, or of a reasonable opportunity to appear and defend, when a just defense in whole or in part existed; or for other reasonable cause, according to the usual rules in such cases."

Delaware:

No statutory enumeration of grounds.

District of Columbia: Comp. St., 1894, Ch. 55, sec. 6.

"The justice who tries the cause may, in his discretion, entertain a motion, to be made on his minutes, to set aside a verdict and grant a new trial upon exceptions, or for insufficient evidence, or for excessive damages; but such motion shall be made at the same term at which the trial was had."

Florida:

No statutory enumeration of grounds.

Georgia: 1 Code, 1911, sec. 6088.

"In all applications for a new trial on other grounds, not provided for in this Code, the presiding judge must exercise a sound legal discretion in granting or refusing the same according to the provisions of the common law and practice of the courts."

Idaho: Code Civ. Pro., sec. 4439.

Same as the California statute.

Illinois: Hurd's St., Ch. 110, sec. 57.

"In all cases where a new trial shall be granted on account of improper instructions having been given by the judge, or improper evidence admitted, or because the verdict of the jury is contrary to the weight of the evidence, or for any other cause not the fault of the party applying for such new trial, said new trial shall be granted without costs, and as of right."

Indiana: Burn's Ann. St., sec. 585.

Same as the Arkansas statute, except 4, which reads simply, "Excessive damages."

Indian Territory: St. 1899, sec. 3556.

Same as the Arkansas statute.

Iowa: Code, 1897, sec. 3755.

Same as the Arkansas statute, except that the term "referee" occurs after "jury" and after the second use of the word "court," in 1, and the term "report" occurs after the word "verdict" in 6; and another ground is added as follows:

"9. That the pleadings of the prevailing party do not state facts sufficient to constitute a cause of action or defense, as the case may be, specifying wherein they are defective."

Kansas: G. S. 1909, sec. 5899.

"1. Because of abuse of discretion of the court, misconduct of the jury or party, or accident or surprise which ordinary prudence could not have guarded against, or for any other cause whereby the party was not afforded a reasonable opportunity to present his evidence and be heard on the merits of the case.

2. Erroneous rulings or instructions of the court.

3. That the verdict, report or decision was given under the influence of passion or prejudice.

4. That the verdict, report or decision is in whole or in part contrary to the evidence.

5. For newly discovered evidence material for the party applying, which he could not with reasonable diligence, have discovered and produced at the trial."

Kentucky: Code, 1900, sec. 340.

Same as the Arkansas statute, except that the words "or of his attorney" are added to 2.

Louisiana: Garland's Rev. Code, 1901, sec. 560.

"A new trial shall be granted; 1. If the judgment appear clearly contrary to law and evidence; 2. If the party has discovered, since the trial, evidence important to the cause, which he could not, with due diligence, have obtained before; 3. If the cause has been tried by a jury, and it be shown that the jury has been bribed, or has behaved improperly, or that impartial justice has not been done in the cause."

Maine: R. S. 1903, Ch. 84, sec. 54.

"Any justice of the supreme judicial or of a superior court may, at the same term at which it is rendered, set aside a verdict and grant a new trial in a case tried before him, when in his opinion the evidence demands it."

Maryland:

No statutory enumeration of grounds.

Massachusetts: Rev. Laws, 1902, Ch. 173.

"Sec. 112. The courts may, at any time before judgment, set aside the verdict in a civil action and order a new trial for any cause for which a new trial may by law be granted.

Sec. 113. A new trial may be granted, upon motion, for a mistake of law or for newly discovered evidence in a case heard by the court."

Michigan:

No statutory enumeration of grounds.

Minnesota: Rev. Laws, 1905, sec. 4198.

"1. Irregularity in the proceedings of the court, referee, jury or prevailing party, or any order or abuse of discretion, whereby the moving party was deprived of a fair trial:

2. Misconduct of the jury or prevailing party;

3. Accident or surprise which could not have been prevented by ordinary prudence;

4. Material evidence, newly discovered, which with reasonable diligence could not have been found and produced at the trial.

5. Excessive or insufficient damages, appearing to have been given under the influence of passion or prejudice.

6. Errors of law occurring at the trial, and either excepted to at the time, or clearly assigned in the notice of motion.

7. That the verdict, decision or report is not justified by the evidence, or is contrary to law."

Mississippi:

No statutory enumeration of grounds.

Missouri: Ann. St., 1906, sec. 800.

"In every case where there has been a mistake or surprise of a party, his agent or attorney, or a misdirection of the jury by the court, or a mistake by the jury, or a finding contrary to the direction of the court, or a fraud or deceit practiced by one party on the other, or the court is satisfied that perjury or mistake has been committed by a witness, and is also satisfied that an improper verdict or finding was occasioned by any such matters, and that the party has a just cause of action or of defense, it shall, on motion of the proper party, grant a new trial, and, if necessary, permit the pleadings to be amended on such terms as may be just."

Montana: Rev. St., 1907, sec. 6794.

Same as the California statute.

Nebraska: Code Civ. Pro., sec. 314.

Same as the Arkansas statute except that term "referee" occurs after "jury" and after the second use of the word "court" in 1, and the term "report" occurs after the word "verdict" in 6.

Nevada: C. L. 1900, sec. 3290.

Same as the California statute except 2, which reads merely "Misconduct of the jury."

New Hampshire: Pub. St., 1901, Chap. 230.

"A new trial may be granted in any case, when through accident, mistake or misfortune justice has not been done and a further hearing would be equitable."

New Mexico:

No statutory enumeration of grounds.

New York: Code Civ. Pro., sec. 999.

"The judge presiding at a trial by a jury may, in his discretion, entertain a motion, made upon his minutes, at the same term, to set aside the verdict, or a direction dismissing the complaint, and grant a new trial upon exceptions; or because the verdict is for excessive or insufficient damages, or otherwise contrary to evidence, or contrary to law."

North Carolina: Revisal of 1905, sec. 554.

"The judge who tries the cause may, in his discretion, entertain a motion, to be made upon his minutes, to set aside a verdict and grant a new trial upon exceptions, or for insufficient evidence, or for excessive damages."

North Dakota: Rev. Codes, 1905, sec. 7063.

Same as the California statute.

Ohio: Gen. Code, 1910, sec. 11576.

Same as the Arkansas statute, except that the words "referee, master" occur after the word "jury" and the word "referee" occurs after the second use of the word "court" in 1, and the word "report" occurs after the word "verdict" in 6.

Oklahoma: Comp. Laws, 1909, sec. 5825.

Same as the Arkansas statute except that the word "referee" occurs after "jury" and after the second use of the word "court" in 1, and the word "report" occurs after "verdict" in 6.

Oregon: Lord's Oregon Laws, sec. 174.

"1. Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion, by which such party was prevented from having a fair trial;

2. Misconduct of the jury or prevailing party;

3. Accident or surprise which ordinary prudence could not have guarded against;

4. Newly discovered evidence, material for the party making the application, which he could not with reasonable diligence have discovered and produced at the trial;

5. Excessive damages, appearing to have been given under the influence of passion or prejudice;

6. Insufficiency of the evidence to justify the verdict or other decision, or that it is against law;

7. Error in law occurring at the trial, and excepted to by the party making the application."

Pennsylvania:

No statutory enumeration of grounds.

See: 2 Ash. 31.

South Carolina: Code of Laws, 1902.

"Sec. 2734. Circuit courts shall have power to grant new trials in cases where there has been a trial by jury for reasons for which new trials have usually been granted in the Courts of law of this State."

Sec. 286. Same as the North Carolina Statute.

South Dakota: Code Civ. Pro., sec. 300.

Same as the California statute.

Tennessee:

No statutory enumeration of grounds.

Texas: Sayles Civ. St., sec. 1370.

New trials may be granted, and judgments may be set aside or arrested on motion for good cause, on such terms and conditions as the court shall direct.

Utah: C. L. 1907, sec. 3292.

Same as the California statute.

Vermont:

No statutory enumeration of grounds.

Virginia: Code, 1904, sec. 3392.

"In any civil case or proceeding, the court before which a trial by jury is had, may grant a new trial, unless it be otherwise specially provided. A new trial may be granted as well where the damages awarded are too small as where they are excessive."

Washington: R. & B.'s Ann. Codes, sec. 399.

1 4, same as 1 4 in California.

"5. Excessive or inadequate damages appearing to have been given under the influence of passion or prejudice.

6. Error in the assessment of the amount of recovery, whether too large or too small, when the action is upon a contract, or for the injury or detention of property."

7 8. Same as 6 - 7 in California.

West Virginia: Code, 1906, sec. 3985.

Same as Virginia.

Wisconsin: St. 1898, sec. 2878.

"The judge before whom the issue is tried may, in his discretion, entertain a motion to be made on his minutes to set aside a verdict and grant a new trial upon exceptions or because the verdict is contrary to law or contrary to evidence, or for excessive or inadequate damages."

Wyoming: Comp. St., 1910, sec. 4601.

Same as the Arkansas statute except that the words "referee, master" occur after the word "jury" and the word "referee" occurs after the second use of the word "court" in 1, and the word "report" occurs after the word "verdict" in 6.

JOHNS V. HODGES.

Court of Appeals of Maryland. 1883.

60 Maryland, 215.

RITCHIE, J., delivered the opinion of the court.

* * * * *

After the verdict was rendered, the defendant, discovering that two of the jurors were under twenty-five years of age, on the ground of this want of proper age and his previous ignorance of it, filed a motion for a new trial, and also a petition that the Court refuse to certify the verdict of the jury to the Orphans' Court, because void and illegal.

The Court refused to grant a new trial and also to grant the petition, which it treated as in the nature of a motion for a new trial upon the ground that the objection was not taken in time.

In the course of its opinion upon the point presented the Court forcibly remarks: "It was competent for the defendant to have made the proper inquiries, and after having satisfied himself on the subject, to have made the objection before the juror was sworn, but this he neglected to do. He waited until he had lost his case. If a party to a suit may omit to make such inquiries until after a verdict has been rendered against him, and may then set it aside on discovery and proof of the existence of a good cause of challenge against any one of the jury, it would introduce an additional element of uncertainty in the administration of justice, and lead in many cases to great and unnecessary delay and expense."

* * * * *

Under our present jury system, while the law aims to ex-

clude persons under twenty-five years of age from serving on juries, from the nature of the methods prescribed by the statute for drawing a jury, no certain means are provided for the absolute exclusion of such persons. The presumption arises, therefore, not that the officers charged with the duty of preparing the lists have wholly succeeded in securing those free from all statutory disability, but that they have succeeded so far as diligence and good faith within the scope of their opportunities have enabled them to do so. That the officers charged with the selection of the jury will endeavor to discharge that duty according to law is an obligation not peculiar to those who provide the jury under our present system; but has been incident to the summoning of jurors from time immemorial. But the presumption that jurors only have been provided who have the proper legal qualifications has not been of that character as to render needless the right of challenge. The right of challenge itself is a safeguard provided by law in contemplation of the contingency that the officers whose duty it is to select only qualified persons have failed in the performance of that duty. It is a means specially provided by which a party to a suit may readily and effectually protect himself against any oversight or neglect committed in the original selection. That men may be, and are, summoned, who are not contemplated by the law as the subjects of jury duty, is common experience. And as the consequences of such an error can be readily obviated by inquiry and challenge when they come to be sworn, it is *laches* not to avail of so simple and efficacious a means of protection, where prejudice is apprehended or may be rendered impossible, as examination and challenge before the jury is empanelled. Not to exercise this right, when so simple a matter as the age of the juror is to be ascertained, or where he resides, but to proceed to trial unimformed, and then endeavor after verdict to avail of a defect in these respects, would be not only to entail a loss of time, labor and money that a little diligence at the outset would have prevented, but to offer an inducement to suitors to await the verdict before questioning the qualification of the juror, that, if favorable, the objection may be suppressed, and if adverse, that it may then be called into requisition. No such lottery is to be encouraged.

Among the numerous cases which decide that what is

cause for challenge cannot be relied on to set aside the verdict, if the right of challenge has not been exercised, are *Minna Queen v. Hepburn*, 7 Cranch. 290; *Hollingsworth v. Duane*, 4 Dall. 353; *Amherst v. Hadley*, 1 Pick. 38; *People v. Jewett*, 6 Wendell, 386; *United States v. Baker*, 3 Benedict, 68; *Gormley v. Laramore*, 40 Ga. 253; *Wassum v. Fecney*, 121 Mass. 93; *Rex v. Sutton*, 8 Barn. & Cress, 417.

The fact that the party was not aware of the disqualification when the jury was empanelled is not material; because he *might* have known it. In the cases in 4 Dall., 3 Benedict, 121 Mass., and 40 Ga., just cited, the disqualification was not known when the juror was sworn. The case in 121 Mass., was very similar in its facts to those relied on by the appellant. The objection was to the infancy of the juror, which was unknown to the defendant until the time of making his motion to set aside the verdict. Gray, C. J., in delivering the opinion of the Court, fully reviews the decisions bearing on the subject. Lord Tenterden, in *Rex v. Sutton*, goes so far as to say: "I am not aware that a new trial has ever been granted on the ground that a juror was liable to be challenged, if the party had an opportunity of making his challenge."

* * * * *

Rulings affirmed, and cause remanded.

FITZPATRICK V. HARRIS.

Court of Appeals of Kentucky. 1855.

16 B. Monroe, 561.

* * * A new trial was asked upon the ground that Elliott had been improperly admitted to testify, and that one of the jurors who sat on the last trial had also sat on the first trial. * * *

CHIEF JUSTICE MARSHALL delivered the opinion of the court.

* * * * *

Though the affidavit of the defendant states that he did not know until after he was accepted, that Salyers, who was one of the jury on the last trial, had been one of the jury on

the former trial, (when a verdict was found for the plaintiff,) it is not a sufficient ground for a new trial. The objection might have been made at any time before the juror was sworn, and, as we think, at any time before the entire jury was sworn, and the fact should have been made known as soon as discovered, at any time before the jury retired, when it might have been in the power of the parties to cure or waive the objection. Besides, the record of the former trial furnished to the parties and their counsel the means of knowing the names of the jurors who had then tried the case, and even if they were not personally known, the identity of name would suggest the probable identity of the person; and even without the trouble of examining the record, the fact that there had been a previous trial, authorized, and should have suggested, the question to be asked of the juror himself, whether he had been one of the former jury. With such opportunities of ascertaining the fact, the failure to disclose it until it is made the ground of asking a new trial, raises a presumption of bad faith, or of wilfull neglect, which can only be overcome by showing such extraordinary circumstances, if there can be any such, as will account for ignorance where the party ought to have knowledge, and excuse neglect where he is bound to be diligent. In this case the affidavit of Salyers proves that he and the defendant were familiar acquaintances and friends.—And thus the circumstances strengthen instead of repelling the unfavorable presumptions in the case. And we may add, that even if the defendant himself were ignorant, it is not shown that his counsel, who conducted the defense, did not know the fact now brought forward, nor, if they were ignorant of it, is any reason shown for their neglecting the means of knowledge so easily within their power. The affidavit, therefore, makes out no ground for a new trial.

* * * * *

Affirmed.

KNIGHTS OF PYTHIAS V. STEELE.

*Supreme Court of Tennessee. 1901.**107 Tennessee, 1.*

WILKES, J. This is a suit against the Endowment Bank of the Order of Knights of Pythias to recover \$3,000, the amount of a benefit certificate in the fourth class upon the life of J. K. Steele, payable to his wife as beneficiary.

* * * * *

It is assigned as error that the Court below erroneously refused to grant a new trial on the grounds of incompetency and misconduct of the jury. It appears that three of the jurors who sat upon the case, to wit, Munroe, Felts and Flanagan, had served upon the jury in Shelby County within two years before they were called upon the jury in this case, and were therefore incompetent. It appears that the jury was placed in the box and tendered to the parties in a body. Counsel for the Order, when the jury was thus tendered, asked the question of them collectively if any one of them had served as a juror on a regular panel in any Court in Shelby County within the last two years, and each shook his head.

It appears also that when this jury was made up on the Monday preceding the trial, for service generally in the Court, two of them, Munroe and Flanagan, were examined separately and individually by the presiding Judge, and each answered that he had not served on any regular jury in the county of Shelby within the two years next preceding. The other juror, Felts, appears not to have been present and was not examined on that occasion, but it is reasonably certain from the record that he was examined when he was afterward chosen, though he states he was not.

We are of the opinion that these jurors were not the good and lawful men to whom the parties were entitled as jurors under Article I., Section 6, of the Constitution. *Neeley v. The State*, 4 Bax. 180. They were not competent to serve as jurors, and were subject to challenge. Shannon's Code, § 5090.

While it is not a good objection generally, after verdict, that a juror who sat on the case was incompetent *propter*

defectum, and it does not matter whether the fact was known to the parties or not, yet this rule proceeds upon the idea that the juror might have been examined before being selected or the parties might have ascertained the fact and excluded such juror by challenge. But in this case the counsel for the company exercised reasonable precaution to ascertain if the jury or any one of them was incompetent by inquiring of the jurors themselves, and had the assurance of competency, from the presumption that the trial Judge examined them upon that point when they were placed on the regular jury, and the actual fact of a second examination by himself. The jurors explained that they were mistaken about the time when they served, and did not intend to state a falsehood or mislead. However this may have been, the fact of incompetency existed, and counsel for the company was misled and deceived, after taking proper precautions to ascertain the fact, and by the jurors themselves while either actually or virtually under oath, and it was not simply a case of want of knowledge of incompetency nor a waiver of incompetency, with or without knowledge of its existence, in which case the exception being *propter defectum*, must be considered as waived; but it is a case where the exception was reasonably made, or would have been made but for the incorrect or false statements of the jurors, which misled the defendant's counsel and influenced his action. It is true counsel might have examined the jury books of the Court, and such other Courts in Shelby County as had jurors, but this would have been an extraordinary precaution, which would have consumed time and delayed the Court, and he could not be required so to do.

* * * * *

The judgment of the Court below is reversed, and the cause remanded, and appellee will pay costs of appeal.

UNITED STATES V. CHRISTENSEN.

*Supreme Court of the Territory of Utah. 1890.**7 Utah, 26.*

ANDERSON, J.

The defendant was indicted for unlawful cohabitation, and was tried and convicted. He moved for a new trial upon the ground, among others, of misconduct of the jury tending to prevent a fair and due consideration of the case, based upon affidavits showing that one John Harris, who was one of the petit jury which convicted him, was on the grand jury which found the indictment, and that the fact was not known of him or his counsel until after the verdict, and that the juror stated falsely on his *voir dire* that he had not formed or expressed an unqualified opinion as to the guilt or innocence of the accused of the offense charged. The motion was sustained, and a new trial granted, and the United States excepted to the ruling of the court, and now prosecutes this appeal from the order of the court granting a new trial. When the juror Harris was called, he was sworn on his *voir dire*, and interrogated by defendant's counsel as follows: "Do you know the defendant? Do you know any of the witnesses named on the back of the indictment? Have you talked with any person regarding this case? Have you ever formed or expressed an opinion as to the guilt or innocence of the defendant?" To each of these questions he answered in the negative, and was accepted as a juror in the case.

The only question to be determined is whether the court erred in sustaining the motion for a new trial. In the case of *People v. Reece*, 3 Utah, 72, 2 Pac. Rep. 61, it was held that where a juror falsely stated, upon examination under oath as to his qualifications as a juror, that he was a citizen of the United States, and neither of the defendants knew or had reason to believe until after verdict that he was not a citizen, the defendants could not be deemed to have waived their right to a jury of twelve men possessing the qualification of citizenship, and, being guilty of no negligence or want of watchfulness, were entitled to have the verdict set aside, and a new trial granted. In *People v. Lewis*, 4 Utah,

42, 5 Pac. Rep. 543, the defendant was convicted of grand larceny. One of the trial jury which convicted him was a member of the grand jury which found the indictment against him. Neither the defendant nor his counsel knew this until after the verdict. The defendant moved for a new trial, which was overruled, and the ruling was affirmed in this court upon the ground of the defendant's negligence in not making sufficient inquiries as to the qualifications of the jurors. The jurors were sworn on their *voir dire*, and interrogated as to their statutory qualifications, to which no answer was given. Counsel for defendant then examined the jurors as follows:

"Are you acquainted with the defendant, Walter Lewis, here? Have any of you heard so much about his case as to form or express an opinion, an unqualified opinion, concerning his guilt or innocence? If any of you have, make it known. I will not put questions directly to each of you." The jurors were then asked if any of them were related to the prosecuting witness, and if they had formed or expressed an opinion from anything they had heard him say, and he added: "You don't seem to answer, and I will not put the question to any of you particularly." No statement of the facts constituting the alleged offense was made to the jurors, and hence, the court say, the jurors could not well have known whether they had an opinion as to the guilt or innocence of the defendant or not, and that, taking into consideration the timidity and apparent unwillingness of many jurors to answer questions unless they are individually interrogated, it is not surprising that there was no response to the questions of defendant's counsel. The court was of the opinion that interrogating the jurors in such a general way was such negligence that the defendant could not, after an unfavorable verdict, successfully move for a new trial, when, with the proper diligence, good ground for a challenge of the juror would have been discovered. The court said, however, that "an express unqualified answer that the juror is a citizen, or that he has not formed or expressed an opinion as to the guilt or innocence of the accused, is sufficient to relieve the defense from further investigation unless there is something to put the party upon further inquiry." In the present case the defendant's counsel asked the juror whether he had formed or expressed an opinion

as to the guilt or innocence of the defendant, and he answered that he had not, and under the ruling in *People v. Lewis*, *supra*, the defendant was not bound to pursue the investigation further. It is not shown that the juror Harris had formed or expressed an unqualified opinion as to the guilt or innocence of the defendant further than the fact that he was one of the grand jury that found the indictment against him, and as to this fact he was not interrogated. The case of *Rice v. State*, 16 Ind. 298, was precisely like the one at bar in its facts. One of the trial jurors had been one of the grand jury which found the indictment. The juror was not asked as to whether he had been on the grand jury that found the indictment, but was asked whether he had formed or expressed an opinion as to the guilt or innocence of the accused, and answered that he had not. The fact that he had been on the grand jury was not discovered until after verdict, and, on a motion for a new trial, the affidavit of the juror was filed in support of the verdict to the effect that at the time of being examined he had no opinion as to the defendant's guilt, and had forgotten the circumstance of his having been on the grand jury. The court held that the defendant was entitled to a new trial, and was guilty of no negligence in not sooner discovering the fact of the juror's incompetency, but that, if the fact had been known to the accused at the time the jury was accepted and sworn, he could not afterwards have been heard to make the objection.

An objection to a juror such as is raised in this case is not like merely technical disqualifications, such as alienage, non-residence, and the like, which do not tend to impeach the fairness and impartiality of the jury. It is possibly true that the juror in this case had no opinion at the time of his examination as to the guilt or innocence of the accused. He may have forgotten that he was on the grand jury that found the indictment. He may have voted against finding the indictment, or may have been absent when it was found, as twelve of the fifteen jurors constitute a quorum, and may transact business; but the presumptions of the law are all to the contrary, and, in the absence of any showing to that effect, he must be presumed to have participated in the finding of the indictment, and to have formed an opinion as to the guilt or innocence of the defendant. It might be possible, also, even if the juror had formed an unqualified be-

lief of the defendant's guilt from the evidence submitted to the grand jury, to change the opinion by evidence at the trial, if he were a man of candor and intelligence. But the defendant has a right to be tried by an impartial jury. A juror who, acting on his own oath as a grand juror, and upon the sworn testimony of witnesses, has already formed an opinion as to the defendant's guilt, and has solemnly accused him of a crime, should not be deemed an impartial or proper juror to try him. Having served on the grand jury which found the indictment and having formed or expressed an unqualified opinion or belief that the prisoner is guilty or not guilty of the offense charged, are each a ground of challenge to a juror for implied bias. 2 Comp. Laws 1888, § 5022, subds. 4, 8. And where the accused properly examines the jurors concerning their qualifications, and they do not answer truthfully, he is thereby not only deprived of his right of challenge for cause, but may also be prevented from exercising his right of peremptory challenge. If, in such a case, a defendant, in trying to ascertain whether the jurors are competent or not, without negligence on his part, is denied a new trial, the greatest injustice might be done. In this case the names of the grand jurors did not appear on the indictment, the law only requiring that the name of the foreman should appear; and there was nothing to notify defendant that the juror had been on the grand jury that found the indictment, nor to put him on inquiry. It is true if he had searched the records of the court he would have ascertained that fact, and it would have been commendable prudence and diligence to have done so; but we do not think his failure to do so is such negligence as should deprive him of the right to be tried by an impartial jury, especially in view of the false answer given by the juror. The motion for a new trial was properly granted. In support of the views above expressed, see *Com. v. Hussey*, 13 Mass. 221; *Dilworth v. Com.*, 65 Amer. Dec. 264; *Bennett v. State*, 24 Wis. 57; Hayne, New Trials, § 45, and cases cited. See, also section 64. Our attention has been called to a number of cases where, upon the same state of facts as are presented here, a different conclusion has been reached, but we think the weight of authority as well as of

reason is in accordance with this opinion. The ruling of the district court is affirmed.

ZANE, C. J., and HENDERSON, J., concurred.

FLORENCE, EL DORADO & WALNUT VALLEY RAIL-
ROAD COMPANY V. WARD.

Supreme Court of Kansas. 1883.

29 Kansas, 354.

The opinion of the court was delivered by

VALENTINE, J.: This action grows out of a condemnation proceeding instituted in Butler county by the Florence, El Dorado & Walnut Valley railroad company, to acquire a right-of-way for its railroad over the lands of J. R. Ward and others. Ward, being dissatisfied with the award of the commissioners, appealed to the district court of said county, by which appeal he became the plaintiff, the railroad company became the defendant. The case was then tried before the court and a jury. The jury consisted of Robert F. Moore, R. H. Steele, Harry Jones, James Hughes, and others. In impaneling the jury the following proceedings, among others, were had:

R. H. STEELE, examined by plaintiff's attorney: Q. Have the facts, or what purported to be the facts, been related in your presence or hearing. A. Yes, sir; to a large extent. I have heard a great deal of the case.

Q. Have you heard what purported to be the facts of the damages the plaintiff has sustained? A. I have heard the circumstances of the land and the conditions through which the road ran through there, explained to me.

* * * * *

R. H. STEELE, examined by defendant's attorney: * * *

Q. Have you from Mr. Ward or others heard of a compromise having been made by the defendant railroad company to Mr. Ward in regard to this suit?

(Plaintiff objects as immaterial and irrelevant, which the court overrules, the plaintiff at the time excepting.)

A. Yes, sir; I have.

Q. In what you heard, was any amount stated? A. It was.

Q. Did you, at the time you heard it form any opinion as to whether that amount was more or less than Ward ought to receive?

(Plaintiff objects as immaterial, which objection the court overrules.)

A. I believe I did.

* * * * *

(Defendant's counsel challenge R. H. Steele for cause)

* * * * *

The court overruled defendant's challenge for cause, to which ruling the defendant at the time excepted.

The jury found a general verdict in favor of the plaintiff and against the defendant, and assessed the amount of the damages at the sum of \$1,050. The defendant then moved the court for a new trial upon various grounds, and among others, on the ground of misconduct on the part of the jury. The alleged misconduct was principally that of R. H. Steele. On the hearing of the motion for a new trial, the several jurors were examined orally with reference to certain matters occurring during their deliberations with reference to their verdict. A portion of their evidence is as follows:

[It was shown that Steele, in order to get the verdict above \$1,000, stated to the other jurors that the defendant had offered to pay the plaintiff \$1,000, and also that unless the verdict was above \$1,000, the plaintiff would have to pay the costs.]¹

Upon the foregoing evidence, these questions arise: 1. Was the juror Steele a competent and impartial juror? 2. Was he guilty of misconduct while the jury were deliberating upon their verdict?

The plaintiff claims that the juror was competent and impartial, and that he was not guilty of any misconduct; while the defendant claims the reverse. * * *

The plaintiff also claims that the defendant did not exhaust its peremptory challenges; that, at the time the jury were impaneled and sworn and the trial commenced, the defendant still had one peremptory challenge, which it might

¹ The matter inclosed in brackets is a condensation of facts made by the editor.

have exercised in discharging Steele from the jury if it had so chosen; but that it did not so choose, and therefore Steele remained a member of the jury. We have examined this claim of the plaintiff, and the claim seems to be correct. The record does not show that the defendant exercised more than two of its peremptory challenges, while, under the statutes, each party is entitled to three. (Civil Code, § 271.) This fact, that the defendant did not exercise all its peremptory challenges, we think must have an important bearing in the case. It is our opinion that the juror Steele was not a fair and impartial juror, though his preconceived opinions in the case were not so manifestly prejudicial as to render him an unmistakably incompetent juror. It is also our opinion that he was guilty of unquestionable misconduct in acting as he did in the jury room, and while the jury were deliberating upon their verdict, but his misconduct was not so flagrantly wrong, or so manifestly prejudicial in its influences, as to make it clear that the verdict might have been affected thereby. And while we think that the court below should have discharged the juror Steele on account of his admitted opinions in the case, yet it is difficult for us to say that the court below committed material error in refusing to do so; and while we think that the court below might very properly have granted a new trial on the grounds of his prejudice and misconduct, and the previous failure on the part of the court to discharge him, yet it is difficult for us to say, under all the circumstances of the case, that the court below committed any material error in refusing to so grant such new trial. Parties are usually held to the strictest vigilance in impaneling juries, and generally if an improper person is allowed to remain on the jury through the fault or negligence or want of proper diligence on the part of any party, such party cannot complain. In the present case, the defendant knew that the juror Steele believed that the defendant had offered to confess judgment for a certain amount, and it knew that the juror believed that he knew what that amount was; and yet the defendant failed to challenge the juror peremptorily, although at the completion of the panel it still retained one of its peremptory challenges, unused and unexercised. We think, under such circumstances, it would be proper to hold that the defendant was willing to take the

juror as he was, and to take the chances of his acting fairly and impartially in the case; and that if he did not do so with reference to the facts of which the defendant knew the juror had knowledge, the defendant should not complain. A party should not be allowed to decline to exercise his peremptory challenges in discharging supposed incompetent jurors, and thereby to keep the question open as to their incompetency until after it is ascertained that the verdict is against him, and then allowed him to again raise the question as to competency. He should be compelled to use all reasonable means to discharge all objectionable jurors before the commencement of the trial; and the failure to do so must be considered as a waiver of all known objections. And afterward if the juror should act as it might reasonably be supposed he would act under the circumstances, the party failing to remove him, when he could so easily have done so if he had so chosen, should not be allowed to complain. In the present case, the incompetency of the juror was slight and not very clear, and his misconduct was also slight, and not necessarily prejudicial to the defendant's rights, and probably neither his incompetency nor his misconduct had any effect upon the verdict of the jury; but even if it had, it was partially the fault of the defendant in not removing him by one of its peremptory challenges. According to the testimony of the several jurors, nearly all of them were in favor of assessing the damages at from \$1,100 to \$1,200, instead of \$1,050, as they finally did; and it seems almost certain that if the juror Steele had not said a word, the verdict would not have been any less than it was. Such seems to be the testimony of all the jurors, and their testimony was oral, and in the presence of the trial court. Hence we cannot say, under all the circumstances, that the court below committed material error in refusing to grant the defendant a new trial on the ground of the incompetency and misconduct of the juror Steele.

* * * * *

The judgment of the court below will be affirmed.
All the justices concurring.

SECTION 3. MISCONDUCT OF JURY OR PARTY.¹

UNDERWOOD V. OLD COLONY STREET RAILWAY COMPANY.

*Supreme Court of Rhode Island. 1910.**31 Rhode Island, 253.*

JOHNSON, J. * * *

After verdict, the defendant in due time filed a motion for a new trial upon the following grounds:

* * * * *

“*Sixth.* That said defendant did not have a fair trial of said cause before a competent and impartial jury, inasmuch as one member of said jury, namely, Louis Sisson, was repeatedly intoxicated while said trial was in progress and testimony was being taken therein before said jury, and was asleep during a part of the time when said trial was in progress and testimony was being taken therein, and was biased and prejudiced against the defendant, as shown by remarks made by him to other persons while said cause was being tried and during adjournments taken by said court, and misconducted himself in other ways, all of which will be shown by affidavits to be filed in court in support of this motion, said affidavits when filed to become a part of this motion by reference.

* * * * *

After hearing counsel and considering the affidavits, the trial justice denied the motion so far as it was based on the verdict being against the evidence and the weight thereof, and against the law. He also denied it so far as based upon the condition and misconduct of the juror Sisson and his bias and prejudice. * * *

* * * * *

(1) We have, therefore, in this case, a mass of testimony to the effect that, for at least two days, a juror, during the progress of the trial was so much under the influence of liquor that he was asleep a large part of the time. He so far lost his power of self-control as to be un-

¹ As to misconduct of an attorney as ground for a new trial, see cases under “Argument and Conduct of Counsel,” *supra*, Chapter XII.

able to walk steadily in and out of the jury-box, and by his foolish and childish actions, while testimony was being put in, revealed his own inattention and disturbed the jurors near him. He was boisterous and profane in his language, and talked freely about the case with strangers during the court recesses. According to a great number of witnesses, he was, during the court proceedings, so much intoxicated that it was impossible for him to understand and weigh intelligently the evidence that was introduced in the case.

The authorities are unanimous in recognizing the grave danger of the use of intoxicating liquor by jurors, and condemn in the strongest terms the indulgence in drinking by jurors while sitting in the trial of a case. Some jurisdictions, especially Iowa and Texas, have held that the mere fact of drinking spirituous liquors by jurymen during the trial of a case, without regard to the quantity used or its effect, is sufficient ground for the granting of a new trial. *Ryan v. Harrow*, 27 Iowa, 494; *Jones v. The State*, 13 Texas, 168.

The great weight of authority, however, is in favor of the proposition that, if a juror, during the progress of the trial, drinks intoxicating liquor to such an extent that he is intoxicated or under the influence of liquor so that his faculties are affected, while sitting in the case, the verdict should be set aside. *Perry v. Bailey*, 12 Kan. 539; *Hedican v. Pa. Fire Ins. Co.*, 21 Wash. 488; *Brown v. The State*, 137 Ind. 240; *State v. Ned*, 105 La. 696; *State v. Jenkins*, 116 No. Car. 972; *Davis v. Cook*, 9 Nev. 134; 17 Amer. & Eng. Encyc. Law, p. 1234.

Perry v. Bailey, *supra*, was a case in which two affidavits were filed, stating that one of the jurors, during the progress of the trial, had been under the influence of liquor. The court held that, although the affidavits were not full and positive yet it was clear that the juror had drunk so much as to unfit him for the proper discharge of his duty, and consequently the verdict should be set aside. In the opinion, Judge Brewer, said, at page 546:

"We think however, the great weight of authority establishes these propositions: That if a juror during the progress of the trial drinks intoxicating liquor on the invitation and at the expense of the party who afterwards has the verdict, or if at his own expense he drinks so much as to

be under the influence of liquor while sitting in the case, the verdict ought not to stand; and on the other hand, the mere drinking of spirituous and intoxicating liquors by a juror during the progress of a trial is not, in and of itself, sufficient to set aside a verdict (authorities). Aware as all are of the subtle and potent influence of liquor on the brain, no judge should for a moment permit a trial to proceed where it appeared that any juror was under the influence of intoxicating drink, or permit a verdict to stand which was not the cool, deliberate judgment of sober men."

Hedican v. Pa. Fire Ins. Co., *supra*, was a case where, during the trial at an evening session of the court and during the defendant's argument, a juror was intoxicated. This fact was brought to the attention of the court after the session was concluded and the court permitted counsel at the following morning session to make their arguments without limitation as to time. All the testimony had been put in before the juror became intoxicated, and this fact was urged against the motion for a new trial. The court held that a new trial must be granted because of the misconduct of the juror. The court said, at page 490:

"Parties are entitled to have a cause submitted only to sober jurors, and the court will not undertake an inquiry into the state or condition of mind of a juror who has been intoxicated during the progress of a trial, but will assume that he was incompetent to determine the cause. Drunkenness during the progress of a trial is not only the gravest breach of a juror's duty, but it is also a most serious contempt of the court and the administration of the law."

In *Brown v. The State*, *supra*, the court granted a new trial on the ground of intoxication of one of the jurors during the trial and at page 241 said:

"It seems to be well settled in this state as well as in other jurisdictions that drinking intoxicating liquor during the recess of the court is not such misconduct of the juror as vitiates the verdict, unless the drinking is to such an extent as to produce intoxication; but where a juror drinks to such an extent as to become intoxicated, such conduct renders the verdict invalid and the court, upon proof of such misconduct, should set it aside and grant a new trial."

In *Davis v. Cook*, *supra*, the court said, at page 147:

"In vindication of the character of courts and the purity

of jury trials a verdict participated in by a jury-man with passions inflamed and reason impaired by ardent spirits should not be allowed to stand. Trial by jury regarded by our ancestors as the principal bulwark of their liberties and the glory of the English law, would degenerate into a mockery of justice if verdicts were capriciously determined by intoxicated jurors. The judgment must be reversed."

In American & Eng. Ency. of Law, *supra*, the law is stated to be as follows:

"If during the progress of the trial or during their deliberations on the verdict jurors partake of intoxicating liquors to such an extent as to affect their ability clearly, impartially and calmly to consider the evidence the verdict will be set aside; and the rule applies, it seems, where such an inordinate amount is drunk as to make a juror sick, or to render it probable that he was incapacitated."

* * * * *

The cause is remanded to the Superior Court for a new trial.

CRAIG & COMPANY V. PIERSON LUMBER COMPANY.

Supreme Court of Alabama. 1910.

169 Alabama, 548.

DOWDELL, C. J. * * *

* * * * *

The main question in this case arises out of the action of the trial court in denying the motion for a new trial. The principal ground of the motion was the alleged improper conduct of J. O. Acree, one of the parties to the suit. It was not denied on the hearing of the motion that after the evidence in the case was concluded, and the court had recessed for dinner, before hearing the argument, Acree invited one of the jurors trying the case to dine with him at a certain hotel, which invitation was accepted, and that Acree paid for the juror's dinner. "Misconduct or irregularity on the part of the jurors, if not induced by the

prevailing party, will not ordinarily be ground for setting aside the verdict, unless it was calculated to prejudice the unsuccessful party. When, however, the misconduct is due directly to an improper act by the prevailing party, the verdict will be set aside without reference to the question of resulting injury.”—17 Am. & Eng. Ency. Law (2d Ed.) p. 1204. “It is the general rule that a new trial will be granted if jurors are entertained during the trial by the party in whose favor a verdict is rendered. So it has been held ground for a new trial that the prevailing party furnished jurors with cigars or intoxicating liquors.”—Id. p. 1235.

Aside from protecting the rights of parties, in the fair and impartial administration of justice, respect for the courts calls for their condemnation of any improper conduct, however slight, on the part of a juror, of a party, or of any other person, calculated to influence the jury in returning a verdict. So delicate are the balances in weighing justice that what might seem trivial under some circumstances would turn the scales to its perversion. Not only the evil, in such cases, but the appearances of evil, if possible, should be avoided.

The learned judge who tried the case below, in overruling the motion for a new trial, evidently proceeded on the theory that the defendants waived their right of objection in failing to bring the matter to the attention of the court at their first opportunity after knowledge acquired by them or their attorney of the alleged misconduct of the said Acree. Here the knowledge was acquired during the recess period of the court for dinner or lunch, and on the reconvening of the court, without objection made, the argument of the case proceeded, and the charge of the court to the jury was given, and the jury permitted to retire to make a verdict, and not until a motion for a new trial was the alleged misconduct made known to the court.

The general rule is that, in the impaneling of a jury, matter going to the disqualification of a juror, if within the knowledge of a party or his attorney, should be taken on objection at the time the juror is put upon him for acceptance or rejection; and a failure to so object is accounted a waiver on his part of the objection. But this rule does not and should not apply in case of misconduct on the part of

a juror, arising after his acceptance as such and a trial entered upon. In the present case the alleged misconduct was that of a party, and the remedy of the injured party was by a motion to set aside the verdict and for a new trial. It is true he might have brought the matter to the attention of the court before proceeding further with the trial, but his failure to do so ought not to deprive him of his remedy on a motion for a new trial. It does not lie in the mouth of the party guilty of the misconduct to object on the ground of speculating on the verdict of the jury, since his own misconduct produced the conditions. To require a party to make his objection pending the trial might still further prejudice him, especially if it should happen that he was mistaken in making the charge, though ever so honest.

We are of opinion that the motion for a new trial should have been granted, and that the court erred in refusing it.

* * * * *

For the error of overruling the motion for a new trial, the judgment is reversed, and the cause remanded.

Reversed and remanded.

ANDERSON, SAYRE, and EVANS, JJ., concur.

BAKER V. BROWN.

Supreme Court of North Carolina. 1909.

151 North Carolina, 12.

WALKER, J.— * * *

* * * * *

The defendant moved to set aside the verdict because the plaintiff had talked to one of the jurors. This was not proper conduct on the part of the plaintiff, when unexplained, but the evidence shows that it was inadvertent and that what he said did not even remotely relate to the case tried by the jury of which he was a member, and was utterly harmless. It had no influence whatever upon the jury or the juror with whom the plaintiff talked, and the Court so finds the facts to be. As was said by Judge Pearson, in *State v. Tilghman*, 33 N. C., at p. 552, "Perhaps it would

have been well had his Honor, in his discretion, set aside the verdict and given a new trial as a rebuke to the jury and an assertion of the principle that trials must not only be *fair, but above suspicion*. This, however, was a matter of discretion, which we have no right to reverse. Our inquiry is, was the misconduct and irregularity such as to vitiate the verdict, to make it in law null and void and *no verdict?*” That case is an authority for the position that, under the facts of this case, the motion for a new trial was addressed to the sound discretion of the court. “When the circumstances are such as merely to put suspicion on the verdict by showing, not that there *was*, but that there might have been undue influence brought to bear upon the jury, because there was opportunity and a chance for it, it is a matter within the discretion of the presiding judge; but if the fact be that undue influence was brought to bear upon the jury, as if they were fed at the charge of the prosecutor or prisoner, then it would be otherwise.” *State v. Brittain*, 89 N. C. 483. See, also, *State v. Harper*, 101 N. C. 761; *State v. Morris*, 84 N. C. 757; *State v. Tilghman*, *supra*; *State v. Gould*, 90 N. C. 658; *State v. Barber*, 89 N. C. 523. In *Moore v. Edmiston*, 70 N. C. at p. 481, Justice Bynum, for the Court, thus formulates the rule: “The line of distinction is that to vitiate and avoid a verdict it must appear upon the record that undue influence was brought to bear on the jury. All other circumstances of suspicion address themselves exclusively to the discretion of the presiding judge in granting or refusing a new trial. He is clothed with this power because of his learning and integrity and of the superior knowledge which his presence at and participation in the trial gives him over any other forum. However great and responsible this power, the law intends that the judge will exercise it to further the ends of justice; and though doubtless it is occasionally abused, it would be difficult to fix upon a safer tribunal for the exercise of this discretionary power, which must be lodged somewhere.” It does not appear in this case that the jury were influenced in the slightest degree, in deciding upon their verdict, by what the plaintiff said to one of the jurors. On the contrary, it appears that they were not and could not have been so influenced.

* * * * *

Upon a review of the whole case, we find no error in the rulings and judgment of the court.

No error.

FLESHER V. HALE.

Supreme Court of Appeals of West Virginia. 1883.

22 West Virginia, 44.

This is a writ of error to an order, made by the circuit court of Lewis county, March 16, 1882, setting aside the verdict of the jury and granting a new trial in an action of *assumpsit* brought by the plaintiff in error in the county court of said county, February 29, 1879, against the defendant in error for one thousand six hundred and forty-seven dollars and eighty-four cents, and transferred by operation of law to said circuit court before trial. The defendant pleaded *non assumpsit* and filed specifications of set-off, and the verdict was for two hundred and seventy-one dollars and twenty-seven cents in favor of the plaintiff. After the rendition of the verdict the defendant moved the court to set the same aside, which motion the court sustained and the plaintiff excepted and tendered his bill of exceptions, which shows that the defendant in support of his motion read three several affidavits in which the affiants state, that Allen Snow, one of the jurors who tried the case, was intoxicated and drunk to such a degree that most of the time during the argument he was asleep and incapable of rendering a decision or determining the case in the manner and way of a sober juror.

* * * * *

SNYDER, JUDGE:

The court having set aside the verdict and granted a new trial upon the facts before stated, the single question presented to this Court is, did the court in so doing err? Our statute provides that:

“No irregularity in any writ of *venire facias*, or in the drawing, summoning, or impaneling of jurors, shall be sufficient to set aside a verdict, unless the party making the ob-

jection was injured by the irregularity, or unless the objection was made before the swearing of the jury." Acts 1882, sec. 19, chap. 83, p. 190.

Applying the spirit of said statute and, perhaps, extending the rule and policy of it, the courts Virginia and of this State have repeatedly held, and it is now the settled law of this State, in both criminal and civil trials, that the verdict of the jury will not be set aside for objections to jurors, on grounds which existed before they were sworn, unless it is made to appear that by reason of the existence of such grounds the party objecting has suffered wrong or injustice. *Sweeney v. Baker*, 13 W. Va. 228, and cases there cited. In this class of cases the objections to the jurors were of such character that, if made before the jury was sworn, they would have been sustained and the jurors objected to held to be disqualified; but notwithstanding this and the fact that the parties, were ignorant of any grounds of disqualification until after the verdict, the court refused to set aside the verdict, because it did not appear that said grounds had operated so as to inflict injustice.

The rule is, however, different in cases where the disqualification arises from the misconduct of the jurors after they have been sworn. While it requires clear and satisfactory proof to establish misconduct in a member of the jury after he has been sworn, because the presumption of right acting which obtains with reference to the conduct of every person acting in an official position unless the contrary is shown, applies in full force with reference to the conduct of sworn jurors, yet when misconduct is established of such a nature that prejudice *might* have resulted from it, a presumption of prejudice arises from it, which unless rebutted by the successful party will vitiate the verdict and require a new trial. *Woods v. State*, 43 Miss. 364-72; *State v. Cartwright*, 20 W. Va. 32; *State v. Robinson*, Id. 713.

"Where facts are established which show that improper influences were brought to bear upon the jury, or that they were guilty of improper conduct, such as might have resulted prejudicially to the losing party, a presumption arises against the purity of their verdict; and unless there is testimony which shows that their verdict was not affected by such influences or conduct, it will be set aside; and the burden of producing such testimony is upon the party claiming

the right to keep the verdict. The rule is one of public policy. In order to preserve public confidence in the administration of justice, it is not only necessary that judicial trials should be conducted with reasonable regularity, but that verdicts should be free from the taint of suspicion of improper conduct or influences."—Thomp. & Mer. on Juries, § 439; *Phillip's Case*, 19 Gratt. 485; *Com. v. Roby*, 12 Pick. 496; *Thompson v. State*, 26 Ark. 323.

While these are the general rules established by the courts in regard to verdicts where the disqualification or misconduct of the jurors was unknown to the parties until after verdict, there is another rule which limits these rules and applies to all classes of cases, whether the disqualification of the jurors existed before being sworn or arose out of misconduct during the trial. All the authorities agree that, where a new trial is asked on account of irregularity or misconduct of the jury, it must appear that the party so asking called the attention of the court to it at the time it was first discovered or as soon thereafter as the course of the proceedings would permit, and if he fail or neglect to do so, he will be held to have consented to have waived all objections to such irregularity or misconduct, and, unless it be a matter which could not have been waived, or which could not have been remedied or obviated, if attention had been called to it at the time it was first discovered, he will be estopped from urging it as a ground for a new trial.—*Dilworth's Case*, 12 Gratt. 689; *Coleman v. Moody*, 4 H. & M. 1; *Dower v. Church*, 21 W. Va. 23; *Fox v. Hazelton*, 10 Pick. 275; *Oleson v. Meader*, 40 Iowa, 662; *Lee v. McLeod*, 15 Nev. 158; *State v. Tuller*, 34 Conn. 280; *Dolloff v. Stimpson*, 33 Me. 546; *Martin v. Tidwell*, 36 Ga. 332; *Parks v. State*, 4 Ohio St. 234; *State v. Daniels*, 44 N. H. 383.

The knowledge of the attorney in such case is the knowledge of his client.—*Russell v. Quinn*, 114 Mass. 103; *Fessenden v. Sayer*, 53 Me. 531; *Parker v. State*, 55 Miss. 414; *Cox v. People*, 80 N. Y. 500.

This rule proceeds upon the ground that a party ought not to be permitted, after discovering an act of misconduct which would entitle him to claim a new trial, to remain silent and take his chances of a favorable verdict, and afterwards, if the verdict is against him, bring it forward as a ground for a new trial. A party cannot be permitted to

lie by, after having knowledge of a defect of this character, and speculate upon the result, and complain only when the verdict becomes unsatisfactory to him.—*Selleck v. Sugar H. T. Co.*, 13 Conn. 453; *Orrok v. Com. Ins. Co.*, 21 Pick. 456; *Rex v. Sutton*, 8 Barn. & Cres. 417.

It follows, therefore, that when a party moves for a new trial on the ground of misconduct on the part of the jury, which took place during the trial, he must aver in his motion and show affirmatively that both he and his counsel were ignorant, until after the jury had retired, of the fact of such misconduct. *Thomp. & Mer. on Juries*, § 428 and cases cited; *Id.* § 456.

In the case at bar, the counsel certainly, and, we may presume from his being present at the trial, the defendant also had notice of the misconduct of the juror, Snow, at the time it occurred. In fact, "it was mutually agreed that the case might be tried and determined by the remaining eleven jurors." This agreement was made in the presence of the judge of the court by the counsel both of the plaintiff and defendant. After this agreement was made, no motion or effort was made to remove the said Snow from the jury box. He was not even requested to retire, and, probably, he had no knowledge of the agreement, and so he continued on the jury. Afterwards when, during the subsequent progress of the trial, the court called attention to the fact that said Snow was still on the jury, the counsel for the plaintiff and defendant "agreed that it was immaterial what became of said Snow," and he was, no doubt, in consequence of said agreement allowed to remain on the jury until after the verdict. Certainly by this conduct the defendant consented to have the said Snow remain on the jury after he knew of his misconduct, and, under the rule of law before stated, he thereby waived all right to object to the verdict on that ground and estopped himself from relying on said misconduct as a ground for a new trial, unless his situation and rights were such at the time he made the discovery, that the objection could not have been obviated, or that his right, was such that no waiver or consent could conclude him.

If he had made the objection and insisted on it, the court could, under our statute, have had another juror sworn in his place. Code, ch. 159, § 7. Or by consent the cause

might have been tried by the court, or by the remaining jurors or seven of them. Code, ch. 116, § 29; *Dilworth's Case*, 12 Gratt. 708; *Tooe's Case*, 11 Leigh. 714; *State v. Van Matre*, 49 Mo. 268.

The objection, therefore, if it had been made could have been obviated at the time, and that the rights of the defendant were such that he could waive them is equally clear. This is a civil action and in such cases any consent of the parties is binding. They relate to and affect only individual rights which are entirely within their personal control, and which they may part with at their pleasure. The design of such actions is the enforcement of merely private obligations and duties. Any departure from legal rules in the conduct of such actions with the consent of the litigants is, therefore, a voluntary relinquishment of what belongs to them exclusively.—Thomp. & Mer. on Juries, § 8; *Cancemi v. People*, 18 N. Y. 128; *Durham v. Hudson*, 4 Ind. 501; *Commonwealth v. Dailey*, 12 Cush. 80; *Sarah v. State*, 28 Ga. 576.

Upon the foregoing authorities as well as upon justice and reason it is plain, that the defendant could have waived as in fact he did waive the irregularity arising from the misconduct of the said juror, Snow, and his conduct and acquiescence after he was apprised of the misconduct of said juror, in permitting him to remain on the jury, must be regarded as a consent that he should so remain notwithstanding such misconduct; and, consequently, it would be unjust to permit the defendant, after having taken his chance of a favorable verdict, to take an advantage of an irregularity, which he had waived and consented to, for the purpose of avoiding an unfavorable verdict.

I am, therefore, of opinion that the said order of the circuit court setting aside the verdict of the jury and granting a new trial is erroneous and must be reversed with costs to the plaintiff in error; and this Court proceeding to enter such judgment as the said court ought to have entered, it is considered that the defendant's motion to set aside the verdict be overruled and that the plaintiff recover from the defendant the sum of two hundred and seventy-one dollars and twenty-seven cents, the amount of the verdict of the jury, with interest thereon from the 16th day of March, 1882, till paid and his costs in the prosecution of his

action in said circuit court expended, which is ordered to be certified to said court.

The other Judges concurred.

Judgment reversed.

CORLEY V. NEW YORK & HARLEM RAILROAD
COMPANY.

Appellate Division of the Supreme Court of New York.
1896.

12 Appellate Division, 409.

BARRETT, J. (concurring) * * *

The affidavits conclusively establish that, when the plaintiff was called to the witness stand during the examination of Dr. Kellogg, he made use of crutches and was lifted and helped along by his father, and that he returned to his seat in the same manner; but that, nevertheless, for two weeks and over before the trial the boy had entirely discarded his crutches in the house where he lived, and had done so with his mother's consent. The affidavits stating that he had abandoned the use of crutches indoors before the trial are numerous and uncontradicted. His mother, herself, deposes that she "did request and instruct her son Martin to use crutches at all times within the house and when he went without the house, *for the first three or four weeks after his return from the hospital*; and that during the subsequent intervening weeks prior to the trial your deponent requested and instructed her son Martin to use crutches *when he walked without the house, upon the street, and elsewhere.*" It will be observed that Mrs. Corley here pointedly omitted to state that after the first three or four weeks following his return from the hospital she gave her son any instructions to use crutches *in the house*. It is overwhelmingly established that, during the latter period, he never used them in the house and frequently omitted their use out of doors. Indeed, he played and ran about in the streets quite the same as other boys. The use of crutches in the court room was, therefore, wholly unneces-

sary. The boy had nothing to fear from the people in the court room nor from the narrowness of the aisle to be traversed on his way to and from the witness stand. But, if he had anything to fear from these surroundings, the danger could only have been enhanced by the use of crutches. The reason which is given for their use seems quite shallow. It is, in truth, but a transparent pretense. There could have been but one purpose, and that was to hoodwink the jury—to deceive them as to the boy's sufferings and to appeal to their sensibilities. It was bad enough to present to the jury the false picture of a suffering boy upon crutches. But that was not all. He was lifted up, helped upon his crutches, supported while thereon and assisted, as he proceeded, apparently with great difficulty, to and from the witness stand. This was a gross, and I regret to say, a deliberate deception. For, it appears, by uncontradicted testimony, that immediately after the trial the boy was secluded and rigidly kept within doors. His parents were evidently determined that the spectacle presented in the court room should not be publicly followed by too marked and dangerous a contrast. And yet, while he was thus withdrawn from general observation, he was permitted, without crutch or assistance, to play upon the roof of the house and actually to climb upon the rear fire escape.

* * * * *

It is a mistake to suppose that a new trial can only be granted when a case therefor can be classified under some well-defined head such as surprise or newly-discovered evidence. The court is not thus limited. The true rule is well stated in *Graham and Waterman on New Trials*, 1009, as follows: "It need scarcely be said that any unconscionable advantage obtained during a trial by one party over the other, through fraud or artifice, to the injury of the latter, will be good ground for a new trial. So obvious a principle of common right and justice requires no comment and needs no illustration." I quite agree that verdicts should not lightly be disturbed, and that the court, in granting new trials, should act with great caution. But the rule above stated—a rule which was fully recognized in *Ward v. Town of Southfield* (102 N. Y. 287)—is founded upon justice and necessity. It should be firmly applied when the facts clearly warrant its application. I can conceive of nothing bet-

ter calculated to encourage fraudulent litigation than the minimizing of such misconduct as is here disclosed.

The order should, therefore, be reversed, and a new trial granted, with costs of this appeal to the appellant. The costs of the former trial should abide the event.

SECTION 4. ACCIDENT, MISTAKE AND SURPRISE.

MEHNERT V. THIEME.

Supreme Court of Kansas. 1875.

15 Kansas, 368.

The opinion of the court was delivered by

BREWER, J.: The plaintiffs in error were sued upon a promissory note. Mehnert filed an answer in person, alleging part payment to the amount of \$166.10, and that after the maturity of the note he and his co-defendant had given a mortgage due in twelve months as security, and that this time had not passed. They made no appearance at the trial, and judgment was rendered for the face of the note and interest. On the same day they, by an attorney, filed a motion to vacate the judgment, and grant them a new trial, on the ground that they were prevented from making their defense by "accident, which ordinary prudence could not have guarded against, and unavoidable misfortune." This motion was overruled, and this is the error complained of. Mehnert's affidavit was the only testimony offered upon said motion. He testified that he filed the answer, and that it was true; that he lived twelve miles from Fort Scott, where the court was in session; that he had a large amount of stock, and no male help on his place, and was consequently obliged to be home every night; that in order to be present in court in time on that morning he rose between three and four o'clock, attended to his home duties, and started with his team for Fort Scott between five and six o'clock, drove with all possible dispatch, and made no stoppages on the road; that he reached the court-house about ten o'clock and found that the case had been called and disposed of a

few minutes prior thereto; that the delay in driving in was caused by the bad almost impassable condition of the roads. Was this accident which ordinary prudence could not have guarded against, or unavoidable misfortune? It does not appear that the roads were for that season of the year, December, exceptionally bad, or that by an unexpected change in the weather they had become suddenly bad, or that Mehnert did not by frequent travel have full knowledge of their actual condition. At that time, it is no uncommon thing for country roads to be very rough, and in very bad condition. Common prudence would dictate that one who was acting as an attorney, and attending to business in court then in session, should not run the risk of getting into court in the morning over such roads from a remote part of the county. The real difficulty was, that Mehnert was attempting to perform the double part of suitor and attorney. While this is perfectly proper, yet whoever attempts it subjects himself to the obligations and liabilities of both. It is the duty of an attorney having business in court to be present during its sessions. There is his business; there is his work. Oftentimes that which will excuse the absence of a suitor, will come far short of excusing the absence of his attorney. Now, Mehnert, was acting as an attorney, intrusted with business in the court then in session. Instead of employing some one to take care of his stock on his farm, and being himself in readiness to attend to his case, he is with full knowledge of his great distance from the courthouse, and the almost impassable condition of the roads, attempting to take care of both stock and lawsuit. He succeeded in the former, but failed in the latter, and failed simply from omitting the ordinary precautions which men take under similar circumstances. *Hill v. Williams*, 6 Kas. 17.

The judgment will be affirmed.

All the justices concurring.

GRIFFIN V. O'NEIL.

*Supreme Court of Kansas. 1891.**47 Kansas, 116.*

Opinion by STRANG, C.: * * *

* * * * *

Was the defendant entitled to a new trial because of unavoidable accident, as claimed in his affidavit filed with his motion for a new trial? We think not. The alleged accident consists in a failure of the defendant to receive a telegraphic message in time for him to attend the trial of the case. The accident was merely the miscarriage of an arrangement by the plaintiff with his own attorneys and the telegraph operator at the station nearest his home, for the transmission and delivery to him of a message giving him information concerning the trial of his case. His failure to receive the message in time was not the result of accident at all, but of the negligence of his own agent. If there had arisen a storm of such a character as to have prevented the transmission of the message over the wires in time to notify the defendant so he could be present at the trial, or of such a character as to have prevented the defendant traveling to the place of trial, it might be said he was prevented by accident, but a mere failure of his own agents to do as he alleges they promised to, in connection with the transmission or delivery of a message, is not an accident. The affidavit shows that the message was received by the agent at 8 o'clock in the morning, and that he did not get it delivered in the country to the defendant until it was too late for him to attend the trial. It was not the business of the agent, as the agent of the telegraph company, to deliver the message away from his office, in the country. He was only required to do so in this instance by his agreement with the defendant, and whatever he did or neglected to do under such agreement, he did or neglected as the agent of the defendant. We do not think a failure of the defendant's agent to deliver a message to him, as per request or agreement, in time for him to attend the trial furnishes the defendant with any cause, known to the

law, for a new trial. He made an arrangement with his own agents for notice. He in no wise relied on any arrangement with the plaintiff, nor with the court. He relied upon his own agents, and without any accident or excuse, so far as we know, they failed him, and we cannot relieve him from the consequences.

We find no material error in the record of this case, and therefore recommend that the judgment of the trial court be affirmed.

By the court: It is so ordered.

All the Justices concurring.

STAUNTON COAL COMPANY V. MENK.

Supreme Court of Illinois. 1902.

197 Illinois, 369.

MR. CHIEF JUSTICE MAGRUDER delivered the opinion of the court:

The alleged ground, upon which it was sought by the appellant in the court below to set aside the verdict and grant a new trial, was that the circuit court tried the case out of its order on the docket at the request of appellee's attorneys, and without notice to the appellant, and without any good cause for so trying the case out of its order.

* * * * *

Second—But, even if the case was set for trial out of its order upon the docket, section 16 give the court the right to take such action for good and sufficient cause. That section only provides, that causes shall be tried in the order they are placed on the docket, “unless the court for good and sufficient cause shall otherwise direct.” It nowhere appears in the affidavits, that the court did not have good and sufficient cause for setting the case for trial on Wednesday, October 10, 1900.

* * * * *

Third—The affidavits, filed by the appellant in the court below, do not show that due diligence was exercised by it in this matter, and do not show sufficient excuse for not being

present in court at the time when the case was set for trial. Affidavits, filed in support of applications to set aside judgments by default, or entered in *ex parte* proceedings, are to be construed most strongly against the party making the application. (*Crossman v. Wohlleben*, 90 Ill. 537).

According to the statements in the affidavit of appellant's attorney, he knew that the number of the case at bar was 76 on the law docket for the September term, and that there were seventy-five law cases and sixty-four criminal cases on that docket ahead of the case at bar, and entitled to prior trial. This being so, it was the duty of the appellant to take notice, or at least it is presumed to have taken notice of every step taken in the cause. (*Schneider v. Seibert*, 50 Ill. 284). In his affidavit the attorney states that, in the due course of business, the cases ahead of No. 76 could not have been tried in their order before the latter part of October, or the middle of November, 1900. He also states that he wrote to the clerk of the court on the 10th day of October to inquire when said cause would be for trial, and received notice on the 12th day of October from the clerk, that the case had already been tried on October 10. The attorney had no reason to suppose, so far as is shown by the affidavits, that the present case would not be reached in its regular order upon the docket before the latter part of October or the middle of November, 1900. There is nothing to show, that the case would not have been reached as early as the day, upon which it was set for trial. It is the duty of a party to be present when his case is reached. His negligence in ascertaining when the case will be reached does not excuse his absence. If appellant relied upon the opinion of its attorney as to the time when the case would be reached for trial, it did so at its peril. The negligence of the attorney in such matters is the negligence of the client. (*Mendell v. Kimball*, 85 Ill. 582; *Walsh v. Walsh*, 114 id. 655; *Lawler v. Gordon*, 91 id. 602; *Schultz v. Meiselsbar*, 144 id. 26).

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

WESTERN UNION TELEGRAPH COMPANY V.
CHAMBLEE.

Supreme Court of Alabama. 1898.

122 Alabama, 428.

HARALSON, J. * * *

* * * * *

The defendant afterwards moved the court for a new trial, which was overruled. The cause is here on bill of exceptions reserved on the trial of that motion. It is based on the ground that the attorneys for the defendant were absent by alleged unavoidable delay in consequence of being engaged in the trial of two causes in Birmingham, one in the Federal and the other in the city court in that city.* *

* * * * *

The law firm employed by defendant to defend its suit, consisted of three members, all residing in Birmingham. The case was originally set for trial on October 26, 1897, but by an agreement of counsel on both sides, and with the consent of the court, it was reset for November 3, following. The attorneys for defendant did not appear at Decatur on the last day named. One of them telegraphed on the 2nd, to the clerk of the court in Decatur: "We are engaged in United States Court. Pretty sure can be in Decatur Friday or Saturday;" requesting the clerk to show the message to Mr. Brown, attorney for plaintiff, and have case passed to Friday or Saturday. The clerk replied same day, that Brown was not there and judge refused to make order in his absence. Brown lived in Hartselle, Ala. On the 3d., the same attorney telegraphed to Brown in Decatur: "If case reached please pass until tomorrow. Our firm engaged in city and United States courts. If I cannot come will send some lawyer in my place. If the case will not be reached tomorrow, wire me today." To this Brown replied: "Telegram received after case was disposed of this forenoon. Judgment against defendant for about \$120." Defendant's attorney then telegraphed to Brown or Judge Speake, expressing surprise at the taking of the judgment after seeing his telegram, and stating that he

would be up that night with his witnesses, ready to try the case, and requesting Brown to keep his witnesses there or get them back, if they had gone. To this Brown replied: "Witnesses are gone. Heard nothing of your telegram until my client and witnesses were here ready and demanding trial. Big damage suit against Morgan county on trial, which will last several days."

It is not shown that defendant's counsel attempted to have either of their cases in the city or Federal court laid over, in order that one of them might go to the Decatur court to try this cause, which had been previously set by their consent on the 3d of November. Reasons are stated why one of the counsel engaged in the city court case was needed to try that cause, and another to try the cause in the Federal court, but no facts are shown why it was necessary that the third one should remain in Birmingham on account of either of said causes, further than the expression of a conclusion that it was necessary for him to do so. It is not shown why defendant's counsel, when apprehensive of a conflict in the trials of their causes in Birmingham and at Decatur, did not communicate with plaintiff and his attorney, Brown, both of whom lived at Hartselle, before the latter left home to come to Decatur to try said cause, and attempt to make arrangements for the postponement of this cause. It appears they presumed it would be done as a matter of courtesy, and they delayed timely effort to effect such an arrangement. The attorney of defendant, who did the correspondence by wire, in one of his messages to plaintiff's attorney, stated that if he could not come at a certain time, if the case was laid over till then, he would send another attorney to represent him. He does not show, that he might not have done this and had the case tried when set. It also appears, there were other capable lawyers living in Decatur, who had no connection with this case, who, for aught appearing, could have represented defendant. It was the duty of defendant or his attorneys to have made some arrangement for the trial of the cause, by the appearance of one of them, or by a suitable representative for the purpose, and not to have depended on a courtesy to be shown them by opposing counsel, especially when it would have been at considerable expense to his client to do so. We will not attempt to deal with the question of courtesy

between opposing counsel. The judge who tried this cause, sitting as a fair arbiter in the premises, with all the facts before him, decided that it was not his duty to grant a new trial, and we are unable to hold that he erred in so doing. This conclusion is fully justified by previous decisions of this court.—*Brock v. S. & N. A. RR. Co.*, 65 Ala. 79; *Broda v. Greenwald*, 66 Ala. 538; *McLeod v. Shelby Mfg. & Imp. Co.*, 108 Ala. 81.

Affirmed.

HOSKINS V. HIGHT.

Supreme Court of Alabama. 1891.

95 Alabama, 284.

STONE, C. J.* * *

* * * * *

The power to set aside verdicts and grant new trials is inherent in our courts of common-law jurisdiction; and in the exercise of this power the court is called upon to use its equitable discretion to prevent a palpable and material wrong. As said by Clopton, J., in *Cobb v. Malone*, 92 Ala. 630, "The power is essential to prevent irreparable injustice, in cases where a verdict wholly wrong is the result of inadvertence, forgetfulness, or intentional or capricious disregard of the testimony, or of bias or prejudice, on the part of juries, which sometimes occurs."

When, in the exercise of this inherent power, the trial court grants a new trial, the presumption is that it has rightfully used its discretion; but, if the contrary appears, and it is plainly shown that the trial court has abused its power, this discretion, being judicial in its character, should be revised on appeal.—*Edsall v. Ayres*, 15 Ind. 286; *Lloyd v. McClure*, 2 Greene (Iowa), 139; *Frieley v. David*, 7 Iowa, 3.

The grounds upon which a new trial may be granted are as varied as the circumstances of each individual case. In the exercise of a sound discretion, the court must consider the particular surroundings, and have special regard to the

equitable demands of each separate case. But text-writers and different courts recognize many different grounds for the granting of new trials. Surprise and mistake are placed in this category; and there are many instances where new trials have been granted, because one party to a suit has been taken by surprise, or has been prejudiced, on account of a mistake or inadvertence for which he was not responsible, and which was not occasioned in any way by his negligence. No doubt it was intended that the ground upon which the new trial in this case was asked and granted should receive its force and efficacy from this division of the causes that justify such equitable interposition by the court. We shall so consider it; for the ground as stated in the motion is, that the defendant "was prevented from making his defense thereto by accident or mistake, and without fault on his part."

In order to obtain a new trial on the ground of mistake and surprise, there are certain requirements which must be fulfilled as conditions precedent to the exercise by the trial court of this discretion. It must be shown that the surprise or mistake occurred in reference to some matter material to the issue involved; that injury resulted therefrom and that the party asking for a new trial has not been guilty of negligence or fault in the premises.—*Beadle v. Graham*, 66 Ala. 102; *Brooks v. Douglass*, 32 Cal. 208; *Jackson v. Worford*, 7 Wend. 62; *Huber v. Lane*, 45 Miss. 608; *Walker v. Kretsinger*, 48 Ill. 502; *Fretwell v. Laffoon*, 77 Mo. 26; 16 Amer. & Eng. Encyc. Law, p. 532.

The first duty of a party surprised at the trial, or upon the discovery of a mistake that will prejudice his interest, is to take proper legal steps to continue or delay the cause; for "he can not neglect this in the hope of securing a verdict in spite of the surprise (or mistake), and then obtain a new trial." In the case of *Shipp v. Suggett*, 9 B. Monroe (Ky.) 5, the court observed; "The correct practice in such case is for the party at once, upon the discovery of the cause, during the progress of the trial, which operates as a surprise on him, to move a continuance or postponement of the trial, and not attempt to avail himself of the chance of obtaining a verdict on the evidence he has been able to introduce, and if he should fail, then to apply for a new trial on the ground of surprise. To tolerate such a prac-

tice would have the effect of giving to the party surprised an unreasonable and unfair advantage, and tend to an unnecessary and improper consumption of the time of the court." We approve this language, and announce the rule, that before a party can be granted a new trial on the ground of surprise and mistake, which was known or discovered before or during the trial, he must first move for a continuance, or take such legal steps to postpone the trial of the cause as the circumstances of the particular case may require. *Washer v. White*, 16 Ind. 136; *Young v. Com.*, 4 Gratt. 550; *Gee v. Moss*, 69 Iowa, 709; *Wells v. Sanger*, 21 Mo. 354; *Rogers v. Hine*, 1 Cal. 429; *Bell v. Gardner*, 71 Ill. 319; *Doyle v. Sterga*, 38 Cal. 459; *Dewey v. Frank*, 62 Cal. 343; 16 Am. & Eng. Encyc. of Law, p. 533. This motion for a continuance, or effort to postpone the trial, is affirmative matter, and should therefore, appear of record. In its absence, this court can not presume such motion or effort was made; and the cause must be considered in the light of such facts and matters of record as appear in the transcript. This conclusion is decisive of the only question presented by this appeal, for no motion for a continuance, nor any effort to postpone the trial, was made when the absence of the important witnesses was discovered. The trial court should not have granted the motion for a new trial, under the circumstances shown in the record.

We could rest our opinion here; but, considering that this phase of the question has never before been presented to us for review, we deem it best to decide the correctness of the lower court's ruling in granting a new trial upon the ground stated in the opinion, and the evidence produced to substantiate such ground.

The accident or mistake that prevented the defendant from making his defense, was the absence of certain witnesses, whose names he had given to his counsel to have summoned. These witnesses were never subpœnæd, and this is, no doubt, at least one of the reasons they were absent. These witnesses were not subpœnæd by reason of the mistake or negligence of the defendant or his counsel, have the clerk of the court subpœna the witnesses. The clerk had no recollection of any such direction, and never whose recollection was that counsel directed his clerk to

instructed the clerk of the court to subpoena the said witnesses.

While it is true that a new trial may be granted to a party who was deprived of the benefit of the evidence of a witness who was excusably absent, and whose testimony would have probably affected the result, yet, in order to claim the benefit of a new trial on this ground, it must, as a general rule, be shown that the witnesses had been regularly summoned and that their absence was not caused through the negligence of the party asking for a new trial. As said in 16 Amer. & Eng. Encyc. of Law, 541, "It is a general rule, that a new trial should not be granted on account of the absence of witnesses, when a continuance has not been asked for, or the absence of the witnesses is caused by any form of neglect by the party applying for a new trial."—*Huhland v. Sedgwick*, 17 Cal. 123; *Tilden v. Gardiner*, 25 Wend. (N. Y.) 663; *Love v. Breedlove*, 75 Tex. 649; *Gee v. Moss*, 68 Iowa, 318; *Young v. Com.*, 4 Gratt. (Va.) 550; *Wells v. Sanger*, 21 Mo. 354; *Rogers v. Hine*, 1 Cal. 429.

The result is the same, whether the absence of the witnesses was caused by the mistake or negligence of the party or of his attorney. "The mistake or negligence of the attorney appearing for the party to a suit is the mistake or negligence of the party; and no new trial will be allowed where such mistake arises from negligence or lack of skill."—*Handy v. Davis*, 38 N. H. 411; *Heath v. Marshall*, 46 N. H. 40. The failure to make defense to a suit, by reason of a mistake of the defendant or his counsel, caused by negligence, can not justify the granting of a new trial, it matters not how effective or just the defense may be.—16 Amer. & Eng. Encyc. of Law, 549, n. 4.

Under the principle above announced, the judgment of the City Court granting a new trial is reversed, and a judgment is here rendered overruling the defendant's motion for a new trial.

Reversed and rendered.

GOTZIAN V. McCOLLUM.

*Supreme Court of South Dakota. 1896.**8 South Dakota, 186.*

FULLER, J. Based upon a claim of ownership, this action was against a sheriff, to recover the value of a stock of boots and shoes seized and sold under an execution issued upon a judgment in favor of the Norwegian Plow Company, against Asa Covell and another; and the appeal is from an order setting aside a verdict and granting the defendant a new trial. At the trial and after plaintiff and appellant had made a *prima facie* case and rested, and in support of that part of the answer in which it is alleged that Asa Covell, the judgment debtor, was in fact the owner of the property in controversy, said Covell was called on the part of the defendant and respondent, and testified that he was not the owner thereof, but that said property belonged to C. Gotzian & Co. when the same was seized and sold on execution. At this stage in the proceedings an application for a continuance was made by respondent's counsel, based upon the ground of surprise in the testimony of the witness Covell. * * * From counsel's affidavit for a continuance, upon which this verdict was set aside and a new trial was ordered, it appears that said Asa Covell, whom defendant had called as a witness, at all times claimed the property, and had recently made certain affidavits in which he had stated specifically, upon oath, that he was at the time of the seizure thereof the owner of all the property described in the complaint herein, and that relying upon said witness, and believing that he would testify upon the trial that he was the owner of the property at the time the same was seized and sold by the sheriff in satisfaction of said judgment against him, and regarding such direct and solemn declarations as sufficient assurance that he would again so testify, counsel had deemed it unnecessary to call and produce at the trial certain other accessible witnesses named in his affidavit, and by whom he would if a continuance were granted, be able to prove certain specified facts, tending to show that said Covell, the judgment debtor, and not C. Gotzian & Co., owned the entire stock of boots and

shoes at the time the same was seized and sold at execution sale by the defendant sheriff.

Upon the hearing of the motion for a new trial, respondent relied wholly upon his affidavit for a continuance; and, in opposition thereto, appellant submitted affidavits to disprove the recitals thereof concerning facts to which certain witnesses would testify, if present, and tending to rebut statements contained in said affidavit relating to the question of good faith, ordinary prudence, surprise, and the exercise of diligence to prevent the same. If, in the exercise of a sound judicial discretion, the court, upon the showing made ought to have granted a continuance, it was entirely proper, upon the same showing, to correct the error by awarding a new trial. Both rulings being within the exercise of a judicial discretion, neither would be reviewed on appeal, in the absence of an abuse thereof. From a knowledge of the nature of his previous statements under oath, respondent's counsel were justified in presuming that the witness Covell would testify at the trial that he was the owner of the property, and they were reasonably justified in omitting to subpoena other witnesses in possession of facts relating to the question of ownership. Obviously, the witness would not have been called upon by counsel for respondent to testify in support of the one vital issue tendered by the complaint of appellant, and traversed by the answer; and, when he did so, it is equally clear that respondent, at least, was surprised. That there are many witnesses who unconsciously or designedly make statements in private consultation, before the trial, more probative, direct, and certain than ever reach the ear of the court and jury from the lips of the witness when under the solemnity of an oath, is a fact well known to every lawyer; but where, as in this instance, a witness has positively and deliberately sworn upon two or three recent occasions that he was at all times the owner of the identical property in dispute, and, when called as a witness for the sole purpose of establishing such fact, not only testifies that he did not own said property, or any part thereof, but that the same belonged to a claimant against whom he was called as a witness, a different, and, we trust, a far more unusual, case is presented. To allow a case to be continued, so near the close of a long jury trial, would necessitate the trouble and expense of

a retrial, in any event; and, in the face of this fact, the court evidently denied the application without serious reflection, and with the intention at the time to correct the error, if any was made, by granting a new trial, when applied for, in case it should be found that substantial injury had resulted therefrom. Upon the entire record, we think the trial court was justified in concluding that reasonable care and diligence had been used to procure testimony on the part of the defense, and that, notwithstanding the surprise, ordinary prudence had been exercised by the attorneys for respondent in preparing for trial, and that the injury resulting from their disappointment in the testimony of the witness Covell might be remedied by another trial of the cause. An application for a continuance or for a new trial on the ground of surprise being addressed to the sound discretion of the trial court, the exercise thereof will be reviewed only in cases where there is manifestly an abuse of such discretion; and a stronger case must be made to justify a reversal on appeal when a continuance or a new trial has been granted that when such application has been refused. *Alt v. Railway Co.* (S. D.), 57 N. W. 1126. The order from which this appeal was taken is therefore affirmed.

HILL V. McKAY.

Supreme Court of Montana. 1908.

36 Montana, 440.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

This action was brought to obtain a decree adjudicating the respective rights of the parties plaintiff and defendant against each other and among themselves, to the use of the waters flowing in Indian creek, a tributary of Ruby river, in Madison county. * * *

The defendant McKay (appellant) is the owner of certain lands situated on Mill creek, another tributary of Ruby river. He also owns a flouring-mill, situated on the

same stream, which is propelled by waterpower. It seems that the water diverted by him through his mill ditch, and for the irrigation of his lands in Mill Creek, does not, after its release, return to Indian creek, but flows into the channel of Mill creek. The issue at the trial, so far as appellant is concerned, was whether the right asserted by him through his mill ditch was superior to the rights of the other claimants during the season of the year when irrigation was necessary for farm purposes, or whether it was available only during the other portions of the year.

The appellant claims as the successor in interest of one Hall, now dead, who, with others, built the mill and constructed the ditch in 1866. The court found that "it was the intention of those who built the mill ditch and appropriated the waters of Indian creek thereby to use the waters for mill and power purposes when the waters in Indian creek were not needed for irrigation purposes." It was accordingly adjudged that the defendant's use must be confined to the autumn, winter and early spring months, when the "waters of Indian creek are not required for the proper irrigation of lands." This defendant has appealed from an order denying his motion for a new trial. The ground of his motion was surprise, in that two witnesses, introduced by him to establish his right, made statements at the trial directly contrary to what they had induced him to believe they would make when he had interviewed them to ascertain what their testimony would be touching his right. His affidavit in support of the motion states, in substance, that he was charged by his counsel with the duty of finding and producing witnesses in support of his water-right through his mill ditch; that in performance of this duty he questioned witnesses John Hatfield and William Ferm as to the use of the water in the mill during the time Hall was one of the owners of it; that he questioned them fully, but neither of them disclosed to him any fact or information tending to impair the superiority of his right during Hall's ownership, or tending to show that Hall ever recognized any right in Indian creek superior to the mill ditch right; that, on the contrary, Hatfield, when questioned by affiant as to the conduct of Hall when the farmers without his consent diverted the water from the

mill ditch, told him that Hall "went and took it," meaning and intending that affiant should understand thereby that Hatfield would testify that under such circumstances Hall reclaimed the water, thus asserting the superior right of the mill ditch; that, relying upon the information so given him by Hatfield and Ferm, and believing that they had fully stated the facts to which they would testify, affiant called them to testify in his behalf, and took no steps to secure testimony from other witnesses to establish the facts; that Hatfield testified upon the trial directly contrary to what he had informed affiant prior to the trial, by saying that Hall had an understanding with the farmers below the head of his ditch that when they wanted the water they could take it and shut the mill down; that the farmers took the water whether it was needed for the mill or not; that this arrangement was the result of a bargain, made about the year 1866 with one Bateman and sundry other persons; that William Ferm testified that Hall had obtained permission from certain unnamed persons to build the mill ditch, with the understanding that when they needed the water it was to be returned to them; that Ferm, being called by plaintiffs as their own witness in rebuttal, testified positively that Hall had told the witness that he used the water from Indian creek with the consent of the people living along the stream below; that both these witnesses constantly associated with the plaintiffs and their witnesses; and, upon information and belief, he charges that their testimony at the trial was the result of collusion with plaintiffs. It is further alleged that if a new trial should be granted, the appellant can produce six witnesses, naming them, whose testimony will show that Hall, his predecessor, always possessed and asserted the right to the use of the mill ditch, to the exclusion of all other rights below the mouth of that ditch. The affidavits of these witnesses were also used in support of the motion, and, generally, support the Hall right, as claimed by the appellant. The plaintiffs filed no counter-affidavits, and hence the statements of the appellant, so far as they are statements of fact, are not controverted.

Do the facts stated make out a case upon which the court should in its discretion, have granted a new trial? * * *

Coming, now, to the merits of the motion, it is the gen-

eral rule that a new trial will be granted on the ground of surprise only when it is clearly shown that the movant was actually surprised, that the facts from which the surprise resulted had a material bearing on the case, that the verdict or decision resulted mainly from these facts, that the alleged condition is not the result of movants own inattention or negligence, that he has acted promptly and claimed relief at the earliest opportunity, that he has used every means reasonably available at the time of the surprise to remedy the disaster, and that the result of a new trial will probably be different. (*O'Donnell v. Bennett*, 12 Mont. 242, 29 Pac. 1044; *Schellhous v. Ball*, 29 Cal. 605; *Doyle v. Sturla*, 38 Cal. 456; *Chicago & Great Eastern Ry. Co. v. Vosburgh*, 45 Ill. 311; *Hull v. Minneapolis St. Ry. Co.*, 64 Minn. 402, 67 N. W. 218; 1 Spelling on New Trial and Appellate Practice, sec. 201; 14 Encyclopedia of Pleading and Practice, 723.) If, at the time the condition arises, the party can make use of other evidence at hand or can avoid the threatened disaster by securing a continuance, or by submitting to a nonsuit, he must do so; and not only so, but, after these means have failed, he must by his showing make it clear that his allegation is not a mere pretense to cover his own lack of diligence. As was said in *Schellhous v. Ball*, *supra*; "It is the duty of the courts to look upon applications for new trials upon the ground of surprise with suspicion, for the reason that from the nature of the case surprise may be often feigned and pretended, and the opposite party may be unable to show that such is the case. Hence, the party alleging surprise should be required to show it conclusively, and by the most satisfactory evidence within his reach." In *Chicago & Great Eastern Ry. Co. v. Vosburgh*, *supra*, the court said: "In applications for new trials on such ground it is not only necessary that the party should have been surprised, but that it was in a matter material to the issue, and that it produced injury to the party; that it was not the consequence of neglect or inattention on the part of the party surprised; also, that he used all reasonable efforts to overcome the evidence which worked the surprise, or that it was not within his power to have done so by the employment of reasonable diligence."

Applying this rule to the appellant's affidavit, we find that it is insufficient in several particulars. It does not ap-

pear therefrom, except by way of conclusion of the affiant, what inquiry appellant made of the witnesses whose conduct is complained of; nor does it appear, except in the same way, what they told him they would testify to. Except the statement of Hatfield that Hall said he "went and took it," referring to the water, we have but the conclusion of the appellant as to what the purport of the statements to him by the witnesses were. They may have had the purport and evidentiary value assigned to them by the appellant, but that this is true we cannot say, because the details of them are not before us. The evidence heard by the trial court is not before us. Therefore, we cannot say, except from the statements in the affidavit, that the court based its findings as to the mill ditch mainly upon their testimony. So far as we know, there may have been other evidence in the case, and sufficient to justify the finding, even if the witnesses had testified as appellant supposed they would. For, while we may infer from the affidavit that they were the only witnesses called by appellant, there is no positive statement that such was the case, or that they were the only witnesses who testified as to the mill ditch. From the affidavit, as a whole, coupled with the fact that many other witnesses were found after the trial was over who could furnish the desired evidence, we think the inference permissible that the appellant was negligent in the search for evidence to sustain his contention prior to the trial, and that the judge who decided the motion thought so.

There is a total want of any showing of prompt action and diligence on the part of the appellant in his effort to avoid the result of his alleged surprise at the testimony, when it came out. He made no application for a continuance. He did not call the attention of counsel to the matter; nor was it called to the attention of the court. It does not appear that he did not have other evidence at hand or within reach which would have been available. In fact, so far as we can judge, he sat silent during the trial, and, though the cause was tried by the court sitting without a jury, and it was held under advisement from June 4th, the date of the trial, until August 30th, the appellant made no application to have the cause reopened, but still remained silent, thinking no doubt, that the result would be satis-

factory. Evidently the surprise upon which he relies is the surprise at the result, rather than at anything that occurred during the trial.

A consideration, which is conclusive, however, is that it is not at all apparent that there is any probability that the result reached by the trial judge would be different if a new trial were granted. As stated above, the evidence is not before us, and though it may be conceded that the new witnesses whose affidavits are embodied in the record would testify as they allege, in the absence of the evidence, we cannot say that a different result would probably be reached.

We are of the opinion that no abuse of discretion is shown, and that the order denying a new trial should be affirmed. It is so ordered.

Affirmed.

MR. JUSTICE HOLLOWAY and MR. JUSTICE SMITH concur.

NELLUMS V. NASHVILLE.

Supreme Court of Tennessee. 1901.

106 Tennessee, 222.

WILKES, J. This is an action against the Mayor and City Council of Nashville for damages, for personal injuries, sustained by Mrs. Nellums on account of a defective plank walk upon what is called in the record Belleville street. There was a trial before a jury in the Court below and verdict and judgment for the city, and the plaintiff has appealed and assigned errors.

The first error assigned is that the Court below should have granted a new trial upon the ground of surprise and newly discovered evidence. In support of this assignment plaintiff states that the city did not disclose its real defense until its last witness, Pat Cleary, was examined. This witness, in substance, stated that the city of Nashville had never done any work on the west side of Belleville Street, nor had it in any other manner accepted the

same as a street since it was included within the corporate limits of the city in 1890.

The insistence is, that this was great surprise to the plaintiff, inasmuch as the fact of nonuser and nonacceptance was not specially pleaded, and the street had been used by the public, and was in a thickly settled part of the city, and had been recognized as a street by the public in numerous ways, and at many times, after it was taken into the city and prior to the accident.

The affidavit upon which the application for a new trial is based states this feature of surprise, and adds that plaintiff will make proof of user and many other facts showing acceptance on the part of the city, and it is supported, as to the latter feature, by the sworn statements of quite a number of witnesses.

The city filed only one plea, that of not guilty, and upon this the plaintiff took issue.

Under the plea, and upon this issue, we think it clear that the city might show by evidence that it had never accepted that portion of the street where the accident occurred. * * * This being true, the plaintiff was bound to take notice of every defense that could be legally advanced under the plea of the general issue. Conceding the proposition to be correct that the evidence was within the issues presented by the pleadings, surprise cannot be predicated upon the fact that evidence was not anticipated along any line embraced within the pleadings. The doctrine is thus laid down in Vol. 16, page 544 (old Ed.) Am. & Eng. Ency. Law.

“The fact that an adversary’s evidence is different from what it was supposed it would be, is not sufficient. If there has been any want of diligence in ascertaining what the testimony of a witness would be, a new trial will be refused.” In 15 Ency. Pleading & Practice, 733, it is said: “A party is bound to come prepared to meet the case made by his adversary, and he cannot plead surprise at material and relevant testimony.” In support of this proposition are cited *Cole v. Fall Brook Coal Co.*, 10 N. Y. 447; *Knapp v. Fisher*, 49 Ver. 94; *Davis v. Ruggler*, 2 Chand. (Wis.), 152; *Bragg v. Moberly* 17 Mo. App. 221;

McNeally v. Stroud, 22 Tex. 229; *Anderson v. Duffield*, 8 Tex. 237, and a number of other cases.

* * * * *

We do not find any reversible error in the action and judgment of the Court below, and it is affirmed with costs.

SECTION 5. VERDICT CONTRARY TO EVIDENCE.

SERLES V. SERLES.

Supreme Court of Oregon. 1899.

35 Oregon, 289.

This is an action by W. L. Serles against Clara Serles, S. C. Zuber, and John Hough, to recover damages for trespass in detaching and removing a dwelling house from the realty of the plaintiff. The verdict of the jury was for plaintiff in the sum of \$400, and against the defendants Serles and Zuber, and judgment having been entered thereon, they appeal * * * After the rendition of the verdict, the defendants interposed a motion to set it aside, and for a new trial, based upon several grounds: First, that of newly discovered evidence; Second, excessive damages; and, Third, that the evidence was insufficient to warrant the verdict,—that the verdict is against the evidence, is not justified thereby, and is contrary to law. This motion was overruled, the court saying: “The question of whether the verdict is a proper one upon the evidence is not now involved, only to the extent as to whether there was any evidence to support it, and there is no doubt that there was, and the court cannot review their decision upon the preponderance of the evidence.”

Reversed.

MR. CHIEF JUSTICE WOLVERTON, after stating the facts, delivered the opinion of the court.

* * * * *

2. It is strenuously urged, however, that the court below decided the motion for a new trial upon an erroneous principle of law, in this: That it was governed, as is shown

by its written opinion, by the idea that, if there was any evidence in the record to support the verdict, it was without power to disturb the same or set it aside; whereas, it is insisted that it is the duty of the court, in the consideration of the motion for a new trial, based upon the insufficiency of the evidence, to weigh all the evidence submitted to the jury, and if, upon the whole case, the verdict appears to be against the weight of evidence and is manifestly unjust, to allow the motion. The trial judge seems to have assimilated the ground for granting a new trial to that which is proper in support of a motion for a non-suit, and hence, his conclusion that, if there was any evidence to support the verdict, it was his duty to uphold it. It is a rule of law, well established in this jurisdiction, that a motion for a nonsuit is in the nature of a demurrer to the evidence, and it not only admits all that the evidence proves, but all inferences that might be legitimately drawn therefrom tending to prove a fact under the issues; and, if there is any evidence offered from which such an inference could be drawn, it is the duty of the court to permit it to go to the jury, as the motion is a test of the competency of the evidence to prove the fact to which it is directed. And the question is, upon such motion, whether there is any evidence tending to prove the material allegation upon which the cause of action is based, and this is one of law. But whether a given amount of evidence is sufficient to sustain an allegation is a question of fact for the jury; so that, if there is any evidence tending to prove a given fact, it is the duty of the court, upon the motion for nonsuit to permit it to go to the jury, and to take their verdict touching it: *Vanbebbber v. Plunkett*, 26 Or. 562 (27 L. R. A. 811, 38 Pac. 707), and cases therein cited.

Under the statute (Hill's Ann. Laws, § 235, subd. 6), the court is authorized to set aside a verdict and grant a new trial for "insufficiency of the evidence to justify the verdict or other decision, or that it is against law." This statute does not appear to have received any direct construction by this court; but there are authorities elsewhere pertinent to the inquiry, and they leave no doubt but that, in passing upon the sufficiency of the evidence to support the verdict, the trial court is authorized to weigh and consider all the evidence which has been submitted to the

jury, and if it is ascertained that the verdict is against the clear weight thereof, or is one that is manifestly unjust, or that reasonable men would not adopt or return, to set it aside and grant a new trial. A similar statute has received express construction by the Supreme Court of the United States in the case of *Metropolitan R. R. Co. v. Moore*, 121 U. S. 558 (7 Sup. Ct. 1334). It was there held that the language used in the statute, which gave a right to set aside the verdict for insufficient evidence, was not to be limited to its insufficiency in point of law, but that it extended also to its insufficiency in point of fact. Such evidence is said to be insufficient in law only where there is a total absence of proof, either as to the quantity or kind, or from which no inference could be drawn in support of the fact sought to be established. But insufficiency in point of fact may exist where there is no insufficiency in point of law; that is, there may be some evidence to sustain every element of the case, competent both in quantity and quality under the law, and yet it may be met by countervailing proof so potent and convincing as to leave no reasonable doubt of the opposite conclusion. So it is that, upon a review of the whole evidence, the testimony in support of the cause of action or defense may be so slight, although competent in law, or the preponderance against it may be so convincing, that a verdict may seem to be plainly unreasonable and unjust; and in many cases it might be the duty of the court to withdraw the case from the jury, or to direct a verdict in a particular way, yet in others, where it would be proper to submit the case to the jury, it might become its duty to set aside the verdict and grant a new trial. The statute of the District of Columbia, which was under consideration, was evidently taken from the New York practice act; and the court in *Metropolitan R. R. Co. v. Moore*, 121 U. S. 558 (7 Sup. Ct. 1334), seems to have followed the New York decisions, upon the principle that, where one jurisdiction adopts the statute of another state or jurisdiction, it also adopts the construction given such statute by the courts of the latter jurisdiction. See *Algeo v. Duncan*, 39 N. Y. 313. In *Slater v. Drescher*, 72 Hun. 425 (25 N. Y. Supp. 153), it is said that an objection to the verdict, because it was against the weight of evidence, means the same thing as if it had

been based upon the insufficiency of the evidence to support it. The Ohio statute is substantially the same as our own, and it is there held that the court, by force thereof may grant a new trial where the verdict is "against or contrary to the weight of the evidence:" *Weaver v. Columbus, S. & H. V. Ry. Co.*, 55 Ohio St. 491 (45 N. E. 717).

The California statute is in the exact language of ours, and the courts of that state, from the time of their earliest cognizance of the statute, have construed it as conferring the power to weigh the evidence and determine its sufficiency; and that if, upon the whole, the judge is satisfied that the verdict is against the indubitable preponderance or clear weight of evidence, or is unjust, or such as reasonable men would not return under the circumstances of the case, he is authorized, in his discretion, to set it aside, which discretion is not subject to review by the supreme court, except for an abuse thereof: *Hall v. The Emily Banning*, 33 Cal. 522. So, it was said in *People v. Lum Yit*, 83 Cal. 130 (23 Pac. 228), that it was the duty of the judge to grant a new trial if he is not satisfied that the evidence as a whole was sufficient to sustain the verdict. And in *People v. Knutte*, 111 Cal. 453 (44 Pac. 166), the court, speaking through VAN FLEET, J., says: "The case was argued here by both parties upon the assumption that the new trial was granted upon the ground that the evidence was deemed insufficient to sustain the verdict; and, while no specific ground is stated in the order of the court, it may be safely taken, from the court's action in advising the jury to acquit, that this assumption of counsel is correct. * * * While it is the exclusive province of the jury to find the facts, it is nevertheless one of the most important requirements of the trial judge to see to it that this function of the jury is intelligently and justly exercised. In this respect, while he cannot competently interfere with or control the jury in passing upon the evidence, he nevertheless exercises a very salutary supervisory power over their verdict. In the exercise of that power, he should always satisfy himself that the evidence as a whole is sufficient to sustain the verdict found, and, if in his sound judgment it is not, he should unhesitatingly say so, and set the verdict aside." See, also, *Lorenzana v. Camarillo*, 41 Cal. 467; *Kile v. Tubbs*, 32 Cal. 332, 339;

Oullahan v. Starbuck, 21 Cal. 413; *Walton v. Magwire*, 17 Cal. 92.

It must be understood, of course, that a mere dissatisfaction of the judge with the verdict is not sufficient ground for disturbing it, but the court must exercise its judgment in each particular case, and if, from all the testimony given the jury, it is satisfied that the verdict is against the clear weight or preponderance of evidence, or that the jury has acted unreasonably in returning the verdict, or has been misled or misdirected, or has acted through improper motives, it is the duty of the court to set it aside and grant a new trial: *Wright v. Southern Express Co.*, 80 Fed. 85, 93; *Mt. Adams, etc., Ry. Co. v. Lowery*, 20 C. C. A. 596, 74 Fed. 463, 477. There may be sufficient evidence to go to the jury to make a *prima facie* case, yet there may be opposing evidence so strong, palpable, and overwhelming as to dissipate any reasonable idea that the *prima facie* case should prevail; or the case as first made may be so strong, and the countervailing testimony so weak and unsatisfactory, as to preclude an honest and rational judgment against the case first made. In either case, if the jury should disregard the better showing, it would plainly be the duty of the court to interpose, upon motion for a new trial, and set the verdict aside; and this is the rationale of the statute, in providing that the verdict may be set aside for insufficiency of evidence.

Mr. Justice BREWER has laid down what seems to us to be the proper rule for the guidance of the trial judge, in *Kansas Pac. Ry. Co. v. Kunkel*, 17 Kan. 172. He says: "The one (the trial judge) has the same opportunity as the jury for forming a just estimate of the credence to be placed in the various witnesses, and, if it appears to him that the jury have found against the weight of evidence, it is his imperative duty to set the verdict aside. We do not mean that he is to substitute his own judgment in all cases for the judgment of the jury, for it is their province to settle questions of fact; and when the evidence is nearly balanced, or is such that different minds would naturally and fairly come to different conclusions thereon, he has no right to disturb the findings of the jury, although his own judgment might incline him the other way. In other words, the finding of the jury is to be upheld by him as

against any mere doubts of its correctness. But when his judgment tells him that it is wrong; that, whether from mistake, or prejudice, or other cause, the jury have erred, and found against the fair preponderance of the evidence, —then no duty is more imperative than that of setting aside the verdict, and remanding the question to another jury.”

We think the court in the case at bar proceeded upon an erroneous principle of law in limiting its inquiry to ascertaining whether there was any evidence from which the jury might infer the facts which were attempted to be proven. It should have gone further, and weighed the evidence in accordance with the principles hereinbefore enunciated: *Larsen v. Oregon Ry. & Nav. Co.*, 19 Or. 240 247 (23 Pac. 974); *State v. Billings*, 81 Iowa, 99 (46 N. W. 862); *City of Tacoma v. Tacoma Light & Water Co.*, 16 Wash. 288 (47 Pac. 738); *Hawkins v. Reichert*, 28 Cal. 534; *Dickey v. Davis*, 39 Cal. 565; *Bennett v. Hobro*, 72 Cal. 178 (13 Pac. 473); *Reid v. Young*, 7 App. Div. 400 (39 N. Y. Supp. 899); *First Nat. Bank v. Wood*, 124 Mo. 72 (27 S. W. 554). The defendants were entitled to have their motion for a new trial passed upon in pursuance of correct principles of law, and, the trial court having failed in this, the cause will be remanded, with directions to determine the motion under the rules herein announced. The cumulative character of the newly-discovered evidence renders defendants' position upon the first ground untenable; and, as it pertains to the second, viz., that the damages assessed are excessive, that was a matter within the discretion of the trial court. By anything we have said in this opinion it is not intended to indicate in any manner our impressions touching the weight of the evidence submitted to the jury, and the court below, having seen the witnesses and observed their manner, must act entirely upon its own judgment in passing upon the motion.

Reversed.

HARRISON V. SUTTER STREET RAILWAY
COMPANY.*Supreme Court of California. 1897.**116 California, 156.*

VAN FLEET, J.—Plaintiff had verdict and judgment against defendants for eight thousand dollars, as damages suffered by the heirs of his intestate through the death of the latter, resulting from injuries received in a collision between a car of the railroad company, on which he was a passenger, and a wagon of the brewing company, occasioned by the negligence of the defendants.

The court below granted defendants a new trial, on the ground that the verdict was excessive; and the plaintiff appeals from such order, urging that it was wholly unwarranted under the evidence, and was an abuse of discretion on the part of the trial court.

Certain preliminary objections are interposed by defendants, and reasons suggested why the order appealed from cannot be reviewed, but these objections, while possibly possessed of some merit, being purely technical, and the court being of opinion that the order must be affirmed on the merits, it will prove more satisfactory to both parties, and more in accord with the disposition of the court, to so dispose of the appeal.

That the granting of a new trial is a thing resting so largely in the discretion of the trial court that its action in that regard will not be disturbed except upon the disclosure of a manifest and unmistakable abuse has become axiomatic, and requires no citation of authority in its support. It is true that such discretion is not a right to the exertion of the mere personal or arbitrary will of the judge, but is a power governed by fixed rules of law, and to be reasonably exercised within those rules, to the accomplishment of justice. But so long as a case made presents an instance showing a reasonable or even fairly debatable justification, under the law, for the action taken, such action will not be here set aside, even if, as a question of first impression, we might feel inclined to take a

different view from that of the court below as to the propriety of its action. More especially is this true where, as here, the question rests largely in fact, and involves the proper deduction to be drawn from the evidence. The opportunities of the trial court, in such instances, for reaching just conclusions are, as a general thing, so superior to our own, that we will not presume to set our judgment against that of the former, where there appears any reasonable room for difference.

Appellant does not seriously question the correctness of these principles, but he contends that the record does not disclose a proper case for their application. He contends that there was no room for the exercise of discretion; that the evidence as to the amount of damages suffered was wholly without conflict; that there was nothing to indicate passion or prejudice, except the amount of the verdict itself, and that there was no showing, by affidavit or otherwise, of any improper conduct on the part of the jury. As to the last suggestion, it is impertinent to the inquiry. Granting a new trial for the misconduct of the jury, such as may be shown by affidavit, is something wholly different and apart from the right which the statute gives to grant such relief on the ground of excessive damages. The former contemplates some overt act of impropriety, such as receiving evidence out of court, reaching a verdict by chance, and the like; while an excessive verdict implies no misconduct of the jury necessarily, but simply that the result has been induced through excited feelings or prejudice, of which the jury may not, perhaps, have been even aware, but which has, nevertheless, precluded an impartial consideration of the evidence. Whether the verdict is excessive is to be determined solely from a consideration of the evidence in the case, and whether it will fairly sustain the conclusion of the jury—a question which cannot be aided by the showing of extrinsic facts, by affidavit, or otherwise.

As to the suggestion that the evidence touching “the amount of damages” was without conflict, we are not wholly certain that we appreciate exactly what counsel means. There was no evidence given as to the *amount* of the damages suffered. The damages sued for were in their nature unliquidated, and no witness pretended to fix the precise

amount plaintiff should recover. We presume counsel means that the evidence as to the circumstances which the jury had a right to regard in determining the award of damages, such as age, condition of life, etc., of deceased, was without conflict. But if this were true, which we do not think can be fairly said, the question as to the proper deduction and conclusion to be drawn from such evidence would still remain for the jury, and whether their consideration of the evidence for this purpose was influenced by passion or prejudice would not necessarily be affected by the fact that the evidence was without conflict. A jury, if excited by prejudice, might as readily award unjust damages where the evidence was uncontradicted as where it was in sharp conflict.

The evidence tended to show that deceased was about sixty-nine years of age, but his physical appearance would seem to have indicated more advanced years. Dr. Dorr, one of his physicians, testified that he looked older; that he appeared between seventy-five and eighty years of age; while Dr. O'Brien, a physician who examined him on behalf of one of the defendants, after the accident and before his death, testified that he considered him a debilitated man; that in his judgment the result of the injury would not have been serious but for his age and debility. According to the testimony of his widow his health was very good, but he had suffered all his life from sick headache, for which she had been required to nurse him.

His income was about one hundred and ten dollars per month, that is, it did not appear that he was in steady or permanent employment, but the evidence tended to show that he was an expert accountant, who straightened out books and tangled accounts when called upon, and that his earnings averaged that sum monthly.

According to the Carlisle mortality tables, he had an expectancy or probable lease of life of a fraction over nine years and a half. He had dependent on him a wife and an adult unmarried daughter.

Upon these facts the jury were instructed, as to the question of damages, in effect, that they should estimate and determine the amount that the deceased would in all reasonable probability have earned in the years yet remaining to him; and, deducting from this the amount which

he would reasonably require for his own personal use and maintenance, give a verdict which would pecuniarily compensate the heirs. It is conceded that this instruction gave the correct rule for the guidance of the jury.

In view of this evidence, and the rule of compensation by which the jury were to be governed, we think it quite manifest that we should not be justified in holding that there was an abuse of discretion in setting aside the verdict. The jury would seem to have proceeded upon the theory that the deceased's expectancy of life would be fully realized, and that he would continue to the end with the same earning capacity as that possessed by him at the time of his death, for their verdict implies that he would have earned, over and above the amount required for his personal needs, the large net sum of eight thousand dollars, and this would necessarily contemplate constant employment without interruption from sickness or other cause and with a rate of earnings in no way diminished, since it will readily be perceived that according to his income his utmost gross earnings in the given time would not have exceeded twelve thousand dollars.

Such a result does not accord with ordinary human experience. The deceased's expectancy of life was not a certainty, but a mere probability. It is true he might have lived even longer than the limit of such expectancy, but the chances were much against it. He might also have retained his vigor and ability to labor to the last, but ordinary experience teaches that the weight of advancing years, after the age attained by deceased, bears strongly against such result. Under these circumstances we do not think it should be said that the conclusion of the trial judge was without support in the evidence.

But appellant urges that it is only where the verdict is so grossly disproportionate to any reasonable limit of compensation warranted by the facts, as to shock the sense of justice, and raise at once a strong presumption that it is based on prejudice or passion rather than sober judgment, that the judge is at liberty to interpose his judgment as against that of the jury; and that such an instance is not shown. The rule invoked is correct, as addressed to the function of the trial court, or when asking this court to set aside the verdict where it has been refused by the court

below. But when we are asked to review the act of that court, where in the exercise of its discretionary power it has seen fit to set aside the verdict on this ground, a very different rule prevails. Every intendment is to be indulged here in support of the action of the court below, and, as elsewhere suggested, it will not be disturbed if the question of its propriety be open to debate.

* * * * *

Order granting new trial affirmed.

HARRISON, J., and GAROUTTE, J., concurred.

GRAHAM V. CONSOLIDATED TRACTION COMPANY.

Supreme Court of New Jersey. 1900.

65 New Jersey Law, 539.

On rule to show cause.

Before Justices DEPUE, VAN SYCKEL and GUMMERE.

PER CURIAM.

This suit was brought by the plaintiff as administrator of Melville T. Graham, deceased, under the act which provides for recovery of damages in cases where the death of a person is caused by wrongful act, neglect or default. *Gen. Stat. p. 1138.* The suit is for the benefit of the father of the deceased, as his next of kin, to recover damages for the "pecuniary injury resulting to him from the death of the deceased." The deceased was a boy four years and four months old at the time the accident happened which resulted in his death. The jury found a verdict for the plaintiff and assessed the damages at \$2,000.

This case was first tried in September, 1896, and resulted in a verdict for \$5,000 for the plaintiff. Upon a rule to show cause why this verdict should not be set aside this court, June Term, 1897, held that the damages were "absurdly excessive," and ordered that a new trial be granted unless the plaintiff would accept the sum of \$1,000, which he declined to do. In October, 1897, the case was again tried, and a second verdict for \$5,000 was rendered. This

verdict was set aside on the ground that the damages were excessive. *Graham v. Consolidated Traction Co.*, 33 Vroom 90. The case was retried January 30th, 1899, and resulted in a verdict in favor of the plaintiff for \$5,000. The verdict was set aside on two grounds—*first*, that the plaintiff had not established by a preponderance of proof that defendant was liable; second, that the damages were excessive. *Graham v. Consolidated Traction Co.*, 35 Id. 10.

The evidence at this trial is substantially the same as it was at the last preceding trial. Two additional witnesses were examined on the part of the plaintiff, Olivett Butler and Joseph A. Smith. As to the amount of damages that should be recovered the case is not in anywise altered. With respect to the case upon the merits as presented at the last preceding trial, the opinion of Chief Justice Magie demonstrates that it was insufficient to sustain any verdict in favor of the plaintiff. A careful examination and consideration of the testimony at the last trial, including that given by Olivette Butler and Joseph A. Smith, the new witnesses called by the plaintiff, leave the case substantially in the same condition, upon the weight of the evidence, that it was in when the last preceding verdict was set aside. The observations of the Chief Justice on the evidence at that time apply with full force to the present case.

The rule should be made absolute on both grounds.¹

¹ This is probably an extreme case, in one aspect of it. Usually the court will acquiesce in the decision of the jury if a second verdict is rendered in substantial conformity to that which was set aside as contrary to the evidence. *Bryant v. Commonwealth Ins. Co.* (1833) 13 Pick. (Mass.) 543; *Monarch G. & S. Min. Co. v. McLaughlin* (1877) 1 Ida. 650; *Van Doren v. Wright* (1896) 65 Minn. 80, 67 N. W. 668.

TATHWELL V. CITY OF CEDAR RAPIDS.

*Supreme Court of Iowa. 1903.**122 Iowa, 50.*

Action to recover damages resulting from personal injuries received by plaintiff while driving in a street of defendant city by reason of his horse stepping into a hole in the highway in or beside a culvert, the result being that plaintiff was thrown to the ground. Judgment for plaintiff on a former trial was reversed, and a new trial ordered. 114 Iowa, 180. On this trial verdict was returned for the plaintiff for \$100 damages, which, on plaintiff's motion, was set aside as inadequate. From this ruling defendant appeals.—*Affirmed.*

MCCLAINE, J.—There was a conflict in the evidence as to whether the street was defective at the place where plaintiff was injured, but the verdict of the jury for the plaintiff establishes the existence of a defect and the negligence of the city with reference thereto, and we have for consideration only this question: Did the trial judge err in setting aside the verdict on the ground that the damages awarded to plaintiff for the injury were inadequate? The right of jury trial, as uniformly recognized under the common-law system, involves the determination by the jury, rather than by the judge, of questions of fact, including the amount of damage to be given where compensation is for an unliquidated demand. Nevertheless, the trial courts have exercised from early times in the history of the common law the power to supervise the action of the jury, even as to the measure of damages, and to award a new trial where the verdict is not supported by the evidence and is manifestly unjust and perverse. And while it is uniformly held that the trial judge will interfere with the verdict of the jury as to matters of fact with reluctance, and only where, on the very face of the evidence allowing every presumption in favor of the correctness of the jury's action, it is apparent to a reasonable mind that the verdict is clearly contrary to the evidence, yet the power of the judge to interfere in extreme cases in unquestionable. It has

sometimes been said that the judge should not interfere where the verdict is supported by a *scintilla* of evidence; but the *scintilla* doctrine has been discarded in this state, and is not now generally recognized elsewhere. *Meyer v. Houck*, 85 Iowa, 319. The general scope and extent of the judge's supervisory power with reference to the jury's verdict as to questions of facts is well illustrated by the very first reported case in which the power appears to have been exercised—that of *Wood v. Gunston*, decided in 1655 by the Court of King's Bench (or, as it was called during the commonwealth, Upper Bench), found in Style's Reports, on page 466. The action was upon the case for speaking scandalous words against the plaintiff, charging him, among other things, with being a traitor. The jury gave plaintiff one thousand five hundred pounds damages, whereupon the defendant moved for a new trial on the ground that the damages were excessive, and that the jury had favored the plaintiff. In opposition to this it was said in argument that, after a verdict the partiality of the jury ought not to be questioned, nor was there any precedent for it—"in our books of the law," and that it would be of dangerous consequence if it should be permitted, and the greatness of the damages cannot be a cause for a new trial. But counsel for the other party said that the verdict was a "packed business," else there could not have been so great damages, and that the court had power, "in extraordinary cases such as this is to grant a new trial." The chief justice thereupon said: "It is in the discretion of the court in some cases to grant a new trial, but this must be a judicial, and not an arbitrary, discretion, and it is frequent in our books for the court to take notice of miscarriages of juries, and to grant new trials upon them. And it is for the people's benefit that it should be so, for a jury may sometimes, by indirect dealings, be moved to side with one party, and not to be indifferent betwixt them, but it cannot be so intended with the court; wherefore let there be a new trial the next term, and the defendant shall pay full costs, and judgment to be upon this verdict to stand for security to pay what shall be recovered upon the next verdict." This case is especially interesting in connection with the present discussion, because it is one in which the

assessment of damages was peculiarly within the province of the jury, and because the nature of the supervisory power of the trial judge is explained as being, in effect, to set aside a verdict for excessive damages in such cases which seem to have been the result of passion and prejudice, and not the deliberate exercise of judgment. That the practice of granting new trials under such circumstances has continued in all the courts administering the common law from the time of the case just cited to the present time is a matter of common knowledge with the profession, and citation of authorities would be superfluous. That the power is exercised to prevent miscarriage of justice by reason of the rendition of a verdict by the jury which is wholly unreasonable, in view of the testimony, which is given in the presence of the court, is universally conceded.

But the question with which we are now more particularly concerned is whether this power of the trial judge may be exercised where the injustice consists in rendering a verdict for too small an amount. If the case is one in which the measure of damages is a question of law, the court has, of course, the same power to set aside a verdict for too small an amount as one which is excessive; and this is, in general, true without question where the damages are capable of exact computation—that is, where the facts established by the verdict of the jury show as matter of law how much the recovery should be. In such cases the court may grant a new trial, unless the defendant will consent to a verdict for a larger amount fixed by the court, than that found by the jury; just as in case of excessive damages under similar circumstances the court may reduce the amount for which the verdict shall be allowed to stand, on penalty of setting it aside if the successful party does not agree to the reduction. *Carr v. Miner*, 42 Ill. 179; *James v. Morey*, 44 Ill. 352. It seems to have been thought by some courts that the general supervisory power over verdicts, where the amount of damage is not capable of computation, and rests in the sound discretion of the jury, should not be exercised where the verdict is for too small an amount; at least not with the same freedom as in cases where it is excessive. *Barker v. Dixie*, 2 Strange, 1051; *Pritchard v. Hewitt*, 91 Mo. 547 (4 S. W. Rep. 437, 60 Am.

Rep. 265); *Martin v. Atkinson*, 7 Ga. 228 (50 Am. Dec. 403). No such limitation on the supervisory power of the trial judge has been definitely established, and by the great weight of authority, both in England and America, the power to set aside the verdict, when manifestly inconsistent with the evidence, and the result of a misconception by the jury of their powers and duties, is as fully recognized where the verdict is inadequate as where it is excessive; and ample illustration of the exercise of this power is found in actions to recover damages for personal injuries or injury to the reputation, although in such cases the amount of damage is peculiarly within the jury's discretion. *Phillips v. London & S. W. R. Co.*, 5 Q. B. D. 781; *Robinson v. Town of Waupaca*, 77 Wis. 544; *Whitney v. Milwaukee*, 65 Wis. 409; *Caldwell v. Vicksburg, S. & P. R. Co.*, 41 La. Ann. 624 (6 So. Rep. 217); *Benton v. Collins*, 125 N. C. 83 (34 S. E. Rep. 242, 47 L. R. A. 33); *McNeil v. Lyons*, 20 R. I. 672 (40 Atl. Rep. 831); *Lee v. Publishers, George Knapp & Co.*, 137 Mo. 385 (38 S. W. Rep. 1107); *McDonald v. Walter*, 40 N. Y. 551; *Carter v. Wells, Fargo & Co.*, (C. C.) 64 Fed. Rep. 1007.

Counsel for appellant urge, however, that the whole matter of granting new trials is controlled by the provisions relating to that subject found in the Code, and that these provisions supersede the common-law rules on the subject. It has not been our understanding that the provisions of the Code relating to practice are intended to entirely supersede the rules of the common law. They are, like other statutory law, merely additions to or modifications of common-law rules. We have held for instance, that, without any statutory provision on the subject, the court may direct a verdict in a proper case; that new trials may be granted in equity after the expiration of one year from the time of rendering judgment, although the statutory provisions as to new trials after judgment limit the right to one year; that the Supreme Court may grant a restraining order, in the exercise of its general appellate jurisdiction, although there is no statutory provision whatever with reference thereto. These illustrations indicate that the provisions of the Code as to practice supersede common-law rules only so far as they are inconsistent therewith.

The legislature has never attempted a complete codification of the rules and principles of the common-law, either as to substantive or remedial rights. The language of Code, section 3446, seems to be directly applicable. It is as follows: "The rule of the common-law, that statutes in derogation thereof are to be strictly construed, has no application to this Code. Its provisions and all proceedings under it shall be liberally construed with a view to promote its objects and assist the parties in obtaining justice." We are inclined, therefore, to the view that the sections relating to new trial do not necessarily cover the whole ground, nor prevent us from recognizing powers of the trial court in this respect which have generally been exercised under the common-law system. See *McDonald v. Walter*, 40 N. Y. 551.

However this may be, we think the authority is expressly given in Code, section 3755, to set aside a verdict which is manifestly inadequate under the evidence. It is true that paragraph four of that section, with reference to the influence of passion or prejudice, mentions excessive damages, and that paragraph five, with relation to error in the assessment of the amount of recovery, whether too large or too small, refers only to actions upon contract, or for the injury or detention of property. But paragraph six authorizes a new trial if the verdict is not sustained by sufficient evidence, and we see no reason for limiting this paragraph to cases where, under the evidence, it appears that the verdict should have been the other way. A verdict in favor of plaintiff for \$100 is as much against the plaintiff as to any right to recover damages not covered by the verdict as though it had been outright for the defendant. Suppose the plaintiff sues on a promissory note, and, defendant having interposed a general denial, plaintiff introduces the note in evidence (the signature not being denied under oath), and there is no evidence whatever that the note is not valid, or has been discharged, and nevertheless the jury returns a verdict for defendant, could it be claimed that a new trial should not be granted? And yet this case does not come under any of the paragraphs of the action on new trial, unless it comes under the paragraph last above referred to. We think this paragraph should have a

liberal interpretation, and that it covers such a case as the one now before us. Similar provisions in other Codes have been construed as authorizing the setting aside of verdicts on plaintiff's motion because the damages allowed are inadequate. *Du Brutz v. Jestup*, 54 Cal. 118; *Bennett v. Hobro*, 72 Cal. 178 (13 Pac. Rep. 473); *Emmons v. Sheldon*, 26 Wis. 648; *Henderson v. St. Paul & D. R. Co.*, 52 Minn. 479 (55 N. W. Rep. 53); *McDonald v. Walter*, 40 N. Y. 551.

* * * * *

The trial judge therefore had the power to set aside the verdict below on account of the inadequacy of the damages, and the question is whether the case is a proper one for the exercise of such power. We interfere reluctantly with the action of the lower court in ruling on motions for a new trial, and especially where a new trial has been granted. *Peebles v. Peebles*, 77 Iowa, 11; *Morgan v. Wagner*, 79 Iowa, 174; *Hopkins v. Knapp & Spaulding Co.*, 92 Iowa, 212; *Mally v. Mally*, 114 Iowa, 309; *Chouquette v. Southern Electric R. Co.*, 152 Mo. 257. Although it is urged in this case that the jury allowed to the plaintiff the actual damages sustained by him so far as they were shown by any evidence corroborating his own testimony, nevertheless, it clearly appears that, if his unimpeached testimony is to be credited, he was damaged to a much larger extent than is covered by the verdict rendered by the jury. We do not hold that the trial judge may substitute his judgment of the credibility of the witness in place of the judgment which the jury has exercised, but we do say that the trial judge may, if he finds that the jury have failed to allow the amount of damages shown by uncontradicted testimony, set aside the verdict as in conflict with the evidence and award a new trial.

The ruling of the lower court was therefore correct, and it is *Affirmed*.

SECTION 6. VERDICT CONTRARY TO LAW.

LYNCH V. SNEAD ARCHITECTURAL IRON WORKS.

*Court of Appeals of Kentucky. 1909.**132 Kentucky, 241.*

Opinion of the court by JUDGE LASSING—Reversing.

* * * * *

Appellant complains that the jury in arriving at their verdict wholly disregarded instruction No. 1, and returned their verdict in favor of plaintiff in spite of it. It is urged by counsel for appellant that, without entering into a consideration as to whether or not this instruction properly presented the law as warranted by the facts proven, nevertheless it was the law of this case, and in disregarding it and returning a verdict in favor of plaintiff as they did the jury found contrary to the law, and that, for this reason, the judgment predicated upon their verdict should be reversed and a new trial awarded. On the other hand, it is claimed by plaintiff's counsel that this instruction did not fairly present the law of the case, as warranted by the facts, but that as the jury, even though not properly instructed, reached a reasonably fair and just conclusion, their verdict and finding should not be disturbed. The greater part of the briefs of opposing counsel is devoted to a consideration of this question. The defendant did not except or object to this instruction, nor is his counsel now objecting to same, but his complaint is that the jury disregarded this instruction. * * *

Section 340, subsec. 6, Civ. Code Prac. makes one of the grounds upon which a new trial may be granted "that the verdict or decision is not sustained by sufficient evidence, or is contrary to law." An examination of the authorities discloses the fact that courts of last resort of the various states are not by any means harmonious in the construction which they have placed upon similar code provisions, and there is, at least, an apparent lack of uniformity upon this point in the decisions in our own state. The superior court in the cases of *Gausman v. Paff*, 10 Ky. Law Rep.

240; *Palmer v. Johnson*, 13 Ky. Law Rep. 590; *Burns v. McGibben*, 9 Ky. Law Rep. 441, and *Bertman v. Ebert's Adm'r.*, 9 Ky. Law Rep. 198, held that, where a verdict is sought to be avoided on the ground that it is contrary to law, the complaint relates to the law as given by the court in its instructions to the jury, and not as it should have been given, or, in other words these decisions hold that where a new trial is sought on the ground that the verdict is contrary to law, the "law" here referred to means the "law" as declared or given by the court, and not as it should have been given; that, even though the court was in error and failed to give the law correctly, nevertheless the jury was bound by the "law" as given, and, if their verdict was contrary to the "law", this fact would authorize a reversal of the case, and the granting of a new trial. And in the case of *Curran v. Stein, etc.*, 110 Ky. 99, 60 S. W. 839, 22 Ky. Law Rep. 1575, this court said: "It is insisted for appellant that the court erred in giving the jury a peremptory instruction, or in interfering with the freedom of their deliberation by requiring them to return a verdict which they were unwilling to render. There was no error of the court in requiring the jury to obey his instructions. The peremptory instruction of the court to the jury, like any other order the court may make in a case, must be obeyed. * * * To hold that the jury may disobey the peremptory direction of the court would be to vest the jury with power to review the decisions of the court on the law of the case." As opposed to this idea, this court in the case of *Armstrong v. Keith*, 3 J. J. March. 153, 20 Am. Dec. 131, upheld a verdict which was admittedly contrary to "law" where the instruction or law, as given by the court, was erroneous, and said that the finding of the jury, under such circumstances, was sufficient to justify a final judgment. * * *

That this court had, even prior to 1830, when the opinion in the case of *Armstrong v. Keith*, was delivered, committed itself to the doctrine that the jury may not disregard the "law" as given by the court, and decide on the facts to the contrary, notwithstanding the instruction, while not directly decided, is incidentally established. In the case of *Smith v. Morrison*, 3 A. K. Marsh, 81, in passing upon

the ruling of the trial court in stopping Smith's counsel from arguing a proposition of law seemingly contrary to that given by the court, this court said: "In thus restraining counsel we are of opinion the court acted perfectly correct. After having obtained from the court an opinion on the legal import of the settlement, a decent regard for that opinion would seem to forbid the same matter from being again canvassed before the jury." * * * The decisions of other courts of last resort upon this point are not harmonious, but the decided weight of the authorities is to the effect that, where a statute authorizes a reversal upon the ground that the verdict is contrary to the "law," the "law" referred to means the "law" of that case as given by the court, whether right or wrong. The Supreme Courts of California, Iowa, Montana, Nebraska, New York, Pennsylvania, South Carolina, Alabama, South Dakota, and England have held that, where a verdict is returned contrary to "law" as given by the instructions of the court, it is such a verdict as will authorize the trial court to set aside because contrary to law. The "law" referred to in the opinions under consideration is invariably held to mean the "law" as given by the court, and not as it should or might have been given. On the other hand, the Supreme Courts of Georgia, Mississippi, and Texas have taken a contrary view, and, where the verdict is in harmony with what the court conceives to be the "law" should have been, rather than in harmony with the law as given by the trial judge, the finding of the jury has not been disturbed.

In the case of *Murray v. Heinze*, 17 Mont. 353, 42 Pac. 1057, 43 Pac. 714, the court had under consideration the correctness of the ruling and judgment of the trial court because it was contrary to the "law" as given by the court. Upon appeal it was urged that this was error because the instruction or "law" as given by the trial court was itself erroneous. In disposing of this question the court said: "But counsel for the appellant contend that, the instruction being erroneous, the court erred in setting aside the verdict, because of the fact that the jury wholly disregarded it. The question presented is: Had the jury the right to disregard the instructions of the court if erroneous? This is a most important question in the administration of

the law. It must be conceded that there is a conflict of authority on this question. Counsel for the appellant cite a number of authorities in support of their claim that the jury may disregard the instructions of the court, if erroneous, if the verdict is otherwise in accord with the law, and that it would be error in the court under such circumstances to set aside the verdict. It seems from the authorities cited by appellant that Kentucky, Georgia, Texas, and some other states have so held. A number of the cases cited by counsel for appellant are not exactly in point; that is, they are cases in which the jury did not seemingly disregard the erroneous instructions upon vitally material issues in the case, and where the verdict was in conformity with the charge of the court, taken as a whole. But it must be confessed that some of the authorities cited hold that the jury have a right to disregard erroneous instructions of the court, and that the verdict should not be set aside in such cases if in accord with the correct law. * * *

But let it be conceded that there is a conflict of authorities upon the question under discussion, or let us suppose that it is a new question, without any adjudications or authority in either event; what course should this court pursue? It has always been held in this jurisdiction that it was the sole province of the jury to determine questions of fact. It has been uniformly held that it was error for the court to invade this special province of the jury by even commenting on the evidence. *State v. Sullivan*, 9 Mont. 174, 22 Pac. 1088, and authorities cited. Our system of practice is certainly based upon the theory that it is the province of the jury to determine facts, and that of the court to determine and declare the law in all cases, except in prosecutions for libel. 'The jury, under the direction of the court, shall determine the law and the facts.' State Const. art. 3, section 10. From this constitutional clause it seems plain that the jury have no right to determine the law in any other case. '*Expressio unius est exclusio alterius.*' This is the first time it has been seriously contended in this court that the jury have the right to determine the law in an ordinary suit at law and to absolutely disregard the instructions of the court on the ground that, in the opinion of the jury, the instructions of the court are erroneous. If

the contention of the appellant is to be upheld, what may we not anticipate as the result in the administration of the law in this state? If the jury may rightfully invade the province of the court, why may not the court retaliate by invading the province of the jury in determining questions of fact? As counsel for the respondent suggest, if the contention of appellant is correct, then logically there is an appeal in all cases upon questions of law from the trial court to the jury. And as counsel for respondent further suggest in their argument, if the jury may determine the law, an attorney arguing the case may say to the jury: 'The court will charge you that the law is so and so, but I say to you the court is wrong. You, the jury, are the judges of the law, and may determine it for yourselves.' Would any court permit such an argument to a jury? Certainly not. But, if the jury are the judges of the law, why should a court prohibit such an argument to them? If a juror should state upon his *voir dire* that he would not be governed by the law as declared by the court, if he thought the instructions erroneous, nobody would doubt that he would not be permitted to sit in the case. Yet, if he has the right as a juror to determine the law, we do not see why he should be challenged for asserting that right. If the contention of appellant is correct, the time of this court in hearing future appeals will be devoted to determining whether the court or the jury were right in their views of the law in the trial of the cause in the lower court. Authority, or no authority, we cannot give our sanction to a practice that would lead to such results. Such a course would ultimately result in overturning our system of keeping separate and distinct the powers and duties of the courts and juries, confining each to its own proper province, in the degradation of the courts, and confusion and chaos in the administration of the law."

And in the case of *Emerson v. County of Santa Clara*, 40 Cal. 543, the court, in passing upon a similar question, said: "It matters not if the instruction disobeyed be itself erroneous in point of law, it is nevertheless binding upon the jury who can no more be permitted to look beyond the instructions of the court to ascertain the law than they

would be allowed to go outside of the evidence to find the facts of the case.”

And in the case of *Barton v. Shull*, 62 Neb. 570, 87 N. W. 322, the Supreme Court in passing upon a similar question, said: “Without at the present time discussing the correctness of the instructions, the rule is that it is the duty of the jury in all cases to follow the instructions given them by the court whether correct or not; and, if they fail to do so, the verdict will be deemed to be contrary to law, and should be set aside and a new trial ordered. The reasons for the rule are obvious. Any other would lead to endless confusion sanctioning utter disregard of the court’s opinion of the law applicable to the pleadings and the evidence, and render its instructions entirely impotent, except when will ed otherwise by the jury. A refusal or failure to follow the instructions of the court is sufficient ground for setting aside the verdict and granting a new trial.”

And in *Way v. Chicago & Rock Island Railway Co.*, 73 Iowa, 463, 35 N. W. 525, the court said: “We will not inquire whether the instruction is correct or not. It was given as the law of the case, and should have been respected by the jury. A verdict which has been found against the instructions of a court should be set aside, even though the disregarded instructions should be erroneous.” To the same effect are *Bunten v. Mutual Ins. Co.*, 4 Bosw. (N. Y.) 254; *Flemming v. Marine Ins. Co.*, 4 Whart. (Pa.) 59, 33 Am. Dec. 33; *Dent v. Bryce*, 16 S. C. 1; *Fleming v. L. & N. R. R. Co.*, 148 Ala. 527, 41 South. 683; *Wood v. Cox*, 84 English Common Law, 280. In this case the Chief Justice, Sir John Jervis, said: “Without discussing the merits of the case or the propriety of the directions of the presiding judge, I think the verdict cannot be sustained. The undersheriff directs the jury to find for the plaintiff, telling them there is no evidence to support the plea, and they persist in finding for the defendant. There must be a new trial.” The authorities which we have cited are representative cases in their respective jurisdictions bearing upon this question. As opposed to the views therein expressed, the Supreme Courts of Texas, Georgia, and Mississippi, as above indicated, have taken a contrary view, but the reason for the rule announced in these several cases cited

by counsel for appellee in support of his contention is far from satisfactory, and the conclusion reached is opposed to both the theory and spirit upon which our system of jurisprudence is based, and is overwhelmed by the weight of authority in other jurisdictions.

After a full consideration, we adhere to the rule inferentially declared in *Smith v. Morrison*, * * * and subsequently followed by the superior court in the several opinions to which we have referred, and by this court in the later case of *Curran v. Stein*, that it is the duty of the trial jury to "conform to the instructions of the court upon matters of law." In other words, that it is the exclusive province of the court to determine questions of law, and that of the jury only to apply the facts proven to the law as given by the court; and, when it is stated that the verdict is contrary to "law," reference is had to the law as given by the court, and not as it might or should have been given.

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SECTION 7. NEWLY DISCOVERED EVIDENCE.

(a) *Cumulative Evidence.*

WINFIELD BUILDING AND LOAN ASSOCIATION V. McMULLEN.

Supreme Court of Kansas. 1898.

59 Kansas, 493.

JOHNSTON, J. J. F. McMullen was elected secretary of the Winfield Building and Loan Association, and for the faithful performance of his duties he executed a bond in the sum of two thousand dollars, which was signed by J. C. McMullen as surety. It was claimed that the secretary misappropriated \$2,201.75 of the money of the Association, and an action was commenced on the bond. Among other defenses alleged, J. C. McMullen, the surety, denied the execution of the bond, and, upon testimony offered, the

jury in answer to a special question found that he did not execute it, and a general verdict was returned and judgment rendered in his favor. Afterward, the Association filed its petition, under the statute, asking the court to set aside the verdict and judgment on the ground of newly-discovered evidence. The bond had been lost and was therefore not produced at the trial. It was afterward found, and it constituted the newly-discovered evidence upon which a new trial was asked. On the application, testimony was offered as to the loss of the bond and the diligence exercised to secure it before the trial was had. After a full hearing, the District Court granted a new trial and set aside the verdict and judgment theretofore rendered. This order was reversed by the Court of Appeals (46 Pac. 410), and its ruling is here for review.

The Court of Appeals held that the testimony was newly-discovered evidence, that it was material, and that due diligence had been used to obtain it, but that it was cumulative in character; and on this ground the reversal was based. That the bond was newly discovered evidence is clear. It was lost and is found. It was very material, from the fact that its execution was denied. When produced, and submitted to the inspection of the jury, they could determine for themselves, from it and from the testimony offered in connection with it, as to the genuineness of the defendant's signature thereon. Whether the surety signed the bond was the principal fact to be investigated; and when the jury found that he did not sign it, they were not required, under the instructions of the court, to pursue their investigations further, nor to determine anything as to the other defenses which were set up. It was therefore a controlling issue in the case; and with respect to it, the new testimony was of the utmost importance. The District Court and the Court of Appeals therefore correctly ruled that the evidence was newly discovered, that it was material, and further that due diligence had been used to obtain and produce it at the trial. Was it cumulative, and did the trial court err in granting a new trial?

The general rule is that newly-discovered evidence which is merely cumulative is not sufficient ground for a new trial; but we are clearly of the opinion that the pro-

posed testimony cannot be regarded as cumulative merely. "Cumulative evidence is evidence of the same kind to the same point." 1 Greenleaf on Evidence, § 2. The fact that the testimony may tend to prove the same issue upon which proof was offered on the trial, is not enough to make it cumulative; and whether or not it is cumulative is to be determined from its kind and character, rather than from its effect. On the trial, testimony was offered that a bond was executed, and that one of the signatures thereon was that of the surety. This was merely the opinion of experts, which, in character, is distinctly different from the instrument itself upon which the action was brought. Instead of taking the judgment or relying on the opinion of others, the jury can inspect the bond, and, from the inspection and by comparison of the signatures thereon with other signatures admitted or proved to be genuine, determine for themselves the point in controversy. It is a very material item of evidence, on the turning-point in the case, wholly dissimilar in character from that produced on the trial; and therefore cannot be classed as cumulative. *The State v. Tyson*, 56 Kan. 686, 44 Pac. 609; *Cairns v. Keith*, 50 Minn. 32; *Knowles v. Northrop*, 4 Atl. 269; *Protection Life Ins. Co. v. Dill*, 91 Ill. 174; *Wilday v. McConnell*, 63 Ill. 278; *Guyot v. Butts*, 4 Wend. 581; *Platt v. Munroe*, 34 Barb. 291; *Wayt v. B. C. R. & N. R. Co.*, 45 Ia. 218.

* * * * *

The judgment of the Court of Appeals will be reversed and the judgment of the District Court will be affirmed.

WALLER V. GRAVES.

Supreme Court of Errors of Connecticut. 1850.

20 Connecticut, 305.

This was a petition for a new trial of a cause, which had previously come before this court. *Graves v. Waller*, 19 Conn. R. 90. For the nature of the action and the decla-

ration, it is sufficient, for the present purpose, to refer to the report of that case.

On the trial of the cause to the jury, it became a material question, and one on which the determination of the cause depended, whether the words "rapacious creditor," were in the original manuscript, when it was handed to the editor of the New Milford Republican, the newspaper in which it was alleged to have been published, or were inserted in the manuscript or published in the newspaper, by some person, unknown to the petitioner, and without his knowledge; the plaintiff in that suit claiming the former branch of the alternative, and the defendant the latter.

The plaintiff introduced evidence tending to prove his claim. The defendant on the other hand, introduced Sylvanus Merwin, as a witness, who testified, that he drew up in part the certificate on which the action was founded; that he asked Waller if he would sign it? That Waller asked him what it was? that he then read it over to him; that he made no objection to signing it, and said it was true; that the words "rapacious creditor," were not in it; that he did not tell Waller, that he intended to publish it; and that he, Merwin, sent it to the publisher of the newspaper, but did not authorize the continuance of it the second week; that he saw the piece soon after it was published, and discovered that it was different from the manuscript when sent to the publisher.

On the hearing of the present petition also, Merwin was a witness, and testified, that he did not authorize any one to make any other alterations in the manuscript than such as were necessary to make its language grammatical.

* * * * *

The deposition of Averill as to the alteration of the original manuscript, was annexed, and made part of the finding of the court in the case. In that deposition, the deponent testified, that being publisher of a weekly newspaper in New-Milford, entitled The New-Milford Republican, he published in that paper, in April or May 1846, a writing signed by Homer Waller of New-Milford, reflecting somewhat severely on the character and person of Jedediah Graves, father-in-law of Sylvanus Merwin; that

this writing came to the deponent's office in the handwriting of said Merwin; that the deponent was instructed, by a private note from Merwin, to make such alterations in the body of the writing, as he saw fit, to make it read grammatically, which he did accordingly; that the words "rapacious creditor," and some others, were inserted by the deponent, without the consent or knowledge of Waller, or even his approbation; and that the substance of the whole writing was materially changed from what it was when it was received by him for publication, without authority from Waller for so doing.

The case was reserved for the advice of this court.

CHURCH, CH. J. The most aggravated portion of the libel complained of, is that by which the plaintiff, Graves, was exposed to public reproach and contempt, as having, in the character and spirit of a rapacious creditor shamefully abused Sylvanus Merwin, his son-in-law, and his wife and children.

This charge was libellous, and, in a good degree, gave sting and character to the whole publication, and was the chief ground of the plaintiff's claim to the recovery of damages at the trial, and upon which the issue of the cause was supposed much to depend, as we infer from the allegations in this petition, and found by the court to be true.

The ground of this application for a new trial, is that from evidence newly discovered, the petitioner Waller, can prove, that the language "*rapacious creditor*," was never used by him, in composing the article, nor approved by him, but without his knowledge, was inserted by the editor of the newspaper in which it was published, and for which unauthorized act he ought not to be made responsible. If such is the real truth, and if the jury had so believed upon the trial, we think the result would and should have been a different one.

There is, and there should be, reluctance in courts to disturb the verdicts of juries, unless in cases where it is most manifest, that either the law has been perverted or mistaken, or that the losing party has not had a full and impartial hearing. It is easy for a party to claim the discovery of new evidence, and it is hard that his opponent

should be compelled to submit to the expense of a second trial, when such claim is either unfounded, or the result of negligence in the first preparation. We feel all this in the present case, and with much hesitation have formed the opinion now declared.

* * * * *

So if the evidence now claimed to be newly discovered, is merely cumulative evidence, we cannot grant a new trial, unless the effect of it will be to render clear and positive, that which was before equivocal and uncertain.

By cumulative evidence is meant additional evidence of the same general character, to the same fact or point which was the subject of proof before. *Watson v. Delafield*, 2 Caines, 224; *Reed v. McGrew*, 1 Harmond, 386; *Smith v. Brush*, 8 Johns. R. 84; *Pike v. Evans*, 15 Johns. R. 210; *The People v. The Superior Court*, 5 Wend. 114; S. C. 10 Wend. 285; *Guyot v. Butts*, 4 Wend. 579; *Gardner v. Mitchell*, 6 Pick. 114; *Chatfield v. Lathrop*, id. 417; *Parker v. Hardy*, 24 Pick. 246.

The fact in dispute, on the trial of this cause, was, whether the words, "rapacious creditor," were a part of the libellous writing, when it was signed by Waller. That they were not, was the most material ground of defence; and this ground was supported, by the testimony of Merwin alone, who wrote the article originally, and who swore that these words were not then in it.

From some of the cases on this subject, it may perhaps be inferred, that courts have supposed all additional evidence to be cumulative merely, which conduced to establish the same ground of claim or defence before relied upon, and that none would be available, for a new trial, unless it disclosed or established some *new ground*. But this does not seem to us to be the true rule, as recognized in the best considered cases.

There are often various distinct and independent facts going to establish the same ground, on the same issue. Evidence is cumulative which merely multiplies witnesses to any one or more of these facts before investigated, or only adds other circumstances of the same general character. But that evidence which brings to light some new and independent truth of a different character, although

it tends to prove the same proposition or ground of claim before insisted on, is not cumulative within the true meaning of the rule on this subject; as in the present case, Merwin testified only, that the libel, as printed and published, was not like the paper written by him and signed by Waller, in the particular referred to. But now appears a new fact, entirely independent of the testimony of Merwin—one which did not exist, at the time Merwin speaks of; which is, that another person, without the knowledge or consent of either Waller or Merwin, inserted the objectionable words into the article, which appeared in the newspaper.

Suppose a question on trial to be, whether the note of a deceased person has been paid, and witnesses have been introduced testifying to various facts conducing to prove such payment, and after a verdict for the plaintiff, the executor should discover a receipt or discharge in full, or had discovered that he could prove the deliberate confession of the plaintiff of the payment of the note. There could be no question, in such a case, but a new trial should be granted, although the new facts go to prove the former ground of defence.

* * * * *

We shall therefore advise a new trial.

In this opinion, WAITE, STORRS, and HINMAN, Js., concurred.

ELLSWORTH, J. concurred in the principles advanced in such opinion, but did not think them applicable to the present case; and for that reason would not grant a new trial.

New trial to be granted.

GERMAN V. MAQUOKETA SAVINGS BANK.

*Supreme Court of Iowa. 1874.**38 Iowa, 368.*

Plaintiff claims \$1,000, alleged to be due on account of business transacted with defendant in the years 1872 and 1873. The defendant denies that any balance is due plaintiff. Trial to the court.

Plaintiff testified in substance that on or about Nov. 25th, 1872, he gave defendant two drafts, each for \$1,000, on Vaughn Bros., Chicago.

That one of these drafts was forwarded to Chicago and paid. That the other, under his direction, was retained; that he gave checks against this draft to the amount of \$980.93, which was charged to his account; and that afterward he settled the account by turning out notes which the bank discounted, and this draft was delivered up to him and destroyed.

The defendant's cashier and vice-president both testified that the draft sent to Chicago was drawn on the 23d of November, and that the bank paid over the counter therefor \$1,000 less exchange.

The plaintiff, in rebuttal, testified that it was possible the draft paid by Vaughn Bros. was drawn on the 23d, but that he did not, on that day or any other day, receive from any officer of the bank \$1,000 in cash over the counter of the defendant on that draft, or upon any draft in controversy in this suit; and that no officer of the bank ever claimed to him before the day of trial that they had paid cash over the counter of the bank on any draft in controversy.

Upon the testimony introduced, the court rendered judgment for the defendant.

Plaintiff thereupon moved for a new trial on the ground of surprise and of newly discovered evidence.

The court overruled the motion on the ground that the newly discovered evidence was cumulative. Plaintiff appeals.

The further material facts are stated in the opinion.

DAY, J.—I. That a new trial will not be granted because of the discovery of evidence, which is merely cumulative, is a general doctrine of the courts, and has been frequently recognized in this state. See 1 Graham and Waterman on New Trials, 486-495, and cases cited; *Alger v. Merritt*, 16 Iowa, 121; *Sturgeon v. Ferron*, 14 Iowa, 160; *Manix v. Malony*, 7 Iowa, 81.

It is exceedingly difficult, if not impossible, to furnish a general definition of cumulative evidence, which in a given case will materially aid in determining whether particular testimony offered falls within or without that class.

In 1 Greenleaf on Evidence, § 2, it is said: "Cumulative evidence is evidence of the same kind, to the same point. Thus, if a fact is attempted to be proved by the verbal admission of the party, evidence of another admission of the same fact is cumulative." And in *Alger v. Merritt*, 16 Iowa, 121, (127), it is said: "If the new evidence be specifically distinct and bear upon the issue, though it may be intimately connected with some parts of the testimony at the trial, it is not cumulative." Citing 1 G. & W. on New Trials. Many of the cases seem to hold that evidence is cumulative if it goes to establish the issue which was principally controverted upon the former trial. These cases, we think, lay down too broad a rule. The evidence may tend to establish the same issue, and yet be so unlike and distinct from any testimony before produced, as to furnish no pretext for declaring it cumulative. The case of *Gardner v. Mitchell*, 6 Pick. 114, furnishes an apt illustration.

In that case the plaintiff recovered a verdict for \$5,337 on a breach of warranty as to the quality of 51,000 gallons of oil sold him by defendant. The defendant moved for a new trial on the ground of newly discovered evidence by which he could prove declarations of the plaintiff that the oil was as good as expected. It was held that this was a new fact not before in the case, and a new trial was granted. The same principle was recognized in *Guyot v. Butts*, 4 Wendell, 579.

In this case plaintiff states in his motion for new trial, "that he can fully prove by the testimony of William Phillips of Clinton county, Iowa, that on the 23d day of No-

vember, A. D. 1872, this plaintiff drew a draft on Vaughn Bros. of Chicago, for \$1,000, at the bank of defendant; that said witness was with plaintiff at the time, and that he, plaintiff did not receive cash for the same, but did check against said draft to the amount of \$500, and plaintiff says he can show he drew no other draft that day.

Plaintiff also states he can prove substantially the same by Abram Gish.

Now, whilst this testimony tends to the establishment of the same fact as that testified to on the former trial by plaintiff, to-wit: that \$1,000 was not paid when the draft was drawn, it tends to establish it in part, as an inference from a new fact, not introduced upon the former trial, viz: that a check was drawn against the draft to the amount of \$500.

It seems to us, therefore, that the case falls within the principle of *Gardner v. Mitchell*, 6 Pick. 114, and *Guyot v. Butts*, 4 Wendell, 579, and that the evidence newly discovered was something more than merely cumulative. See 1 G. & W. on New Trials, 490-493, and cases cited; 3 Id. 1048, and cases cited.

* * * * *

We think the motion for a new trial should have been sustained.

Reversed.

BROWN V. WHEELER.

Supreme Court of Kansas. 1901.

62 Kansas, 676.

POLLOCK, J. * * *

* * * * *

Is the evidence cumulative? Does the fact that the admission made by Van Voorhis Brown in this letter is in writing, while his admissions shown upon the trial were oral, take it out of the rule against cumulative evidence? We think not. Cumulative evidence is evidence of the

same kind to the same point. Here the evidence offered is an admission. Oral admissions of Brown of identical import were shown by witnesses for the defense upon the trial. All are admissions; hence, they are of the same kind of evidence. All go to the same point—to show that Van Voorhis Brown was not the owner of the property. The fact that the admission here made is in writing may have made it stronger, but does not change its nature as evidence; it is cumulative. (*Wisconsin Central R. R. Co. v. Ross*, 142 Ill. 9, 31 N. E. 412; *Klein v. Gibson*, 2 S. W. (Ky.) 116; *Cox v. Harvey*, 53 Ind. 174; *The Town of Manson v. Ware*, 63 Iowa, 345, 19 N. W. 275; *Wayne v. Newman's Adm'r, Etc.*, 75 Va. 811; *Wall v. Trainor*, 16 Nev. 131; *Glidden v. Dunlap*, 28 Me. 379.) * * *

LAYMAN V. MINNEAPOLIS STREET RAILWAY COMPANY.

Supreme Court of Minnesota. 1896.

66 Minnesota, 452.

START, C. J. The plaintiff's intestate died as a result of a collision between a wood cart, which he was driving, and one of the defendant's street cars. Both were going in the same direction. The main issues litigated on the trial of the action, which was for the recovery of damages on account of his death, were the negligence of the defendant and the contributory negligence of the deceased. There was a verdict for the defendant. The trial court granted the plaintiff's motion for a new trial solely on the ground of newly-discovered evidence, and defendant appealed from the order.

The verdict was general only, hence the record does not disclose the ground upon which the jury based the verdict. The trial court stated, in its memorandum, that evidently the jury found that the deceased was guilty of contributory negligence, and that such finding was the basis of the verdict. It cannot be so assumed, although the evidence renders it more probable that such was the case than that the

jury found that the defendant was not guilty of negligence in the premises. These suggestions are made with reference to the character of the newly-discovered evidence, which tends to show that the deceased, as he started to turn his team upon the car tracks for the purpose of avoiding a pile of lumber which had been placed near the curb of the street along which he was driving his cart, looked back in the direction he had been coming, and that there was no car then in sight. It is undisputed that his view, in the direction from which the car came, was unobstructed for at least three blocks. The defendant claims, that this evidence is simply cumulative, that it is false, and would not change the verdict on another trial.

The granting or denying of a motion for a new trial on the ground of newly-discovered evidence is a matter resting largely in the discretion of the trial court and its order will not be reversed on appeal unless it is made to appear that the order violated some legal right of appellant, or was an abuse of discretion; the presumption being that the discretion was properly exercised. *Lampsen v. Brander*, 28 Minn. 526, 11 N. W. 94. The question, then, is not whether the trial court might have properly denied the motion, but whether the granting of it was an abuse of its discretion for any of the reasons assigned by the defendant. The newly-discovered evidence was not cumulative, within the meaning of the general rule that a new trial will not be granted where the evidence is simply cumulative. Cumulative evidence, as the term is here used, is held to be evidence which speaks to facts in relation to which there was evidence on the trial; or, in other words, it is additional evidence of the same kind, and to the same point, as that given on the first trial. But it is not cumulative if it relate to distinct and independent facts of a different character tending to establish the same ground of claim or defense. *Hil. New Trials*, 501; *Nininger v. Knox*, 8 Minn. 110 (140); *Hosford v. Rowe*, 41 Minn. 245, 42 N. W. 1018.

On the trial there was no evidence as to whether the deceased looked to see if a car was approaching before driving upon the tracks. The new evidence directly tends to prove that he did so look. This is a fact bearing upon the question of his contributory negligence. The evidence, therefore, is material, and is not cumulative. The credi-

bility of the evidence, and whether it would probably change the result on another trial, are questions peculiarly, but not exclusively, for the trial judge, who saw the witnesses, heard their testimony, followed the course of the trial, noted the claims of the respective parties, and whose opportunity to judge of the credibility of the newly-discovered evidence, and the probable effect it would produce on another trial, was superior to our own. Our conclusion, from a consideration of the entire evidence given on the trial, is that the trial court did not abuse its discretion in granting the motion for a new trial.

Order affirmed.

(b) *Impeaching Evidence.*

BLAKE V. RHODE ISLAND COMPANY.

Supreme Court of Rhode Island. 1911.

32 Rhode Island, 213.

JOHNSON, J. This is an action of the case, brought by Lewis A. E. Blake against the Rhode Island Company, to recover damages for personal injuries alleged to have been sustained through the negligence of the defendant company in the operation of one of its street cars.

On the 29th day of June, 1906, the plaintiff was driving an ice cart, and had just turned with said cart from Patt street into East avenue, in the city of Pawtucket, when a car of the defendant company, travelling from Providence toward Pawtucket, overtook and collided with said ice cart; and as a result of said collision the ice cart was overturned and the plaintiff was thrown to the ground and injured.

The case was tried before a justice of the Superior Court and a jury, on the 18th, 19th, 20th, and 21st days of October, 1909, and resulted in a verdict for the plaintiff for \$9,082.50. Thereafter the defendant duly filed a motion for a new trial upon the grounds:

* * * * *

“4. That said defendant has discovered new and ma-

terial evidence in said case which it had not discovered at the time of the trial thereof, and which it could not with reasonable diligence have discovered at any time previous to the trial of said case, as by affidavits to be filed in court will be fully set forth, said affidavits being made a part of this motion."

This motion was heard July 2, 1910, by the justice who presided at the trial, and July 8, 1910, a rescript was filed denying said motion on all grounds except that of excessive damages. * * *

* * * * *

The case is now before this court on * * * two bills of exceptions.

The exceptions pressed by the defendant are the following, as numbered in its bill of exceptions:

* * * * *

"25. To the decision of said court denying the defendant's motion for a new trial on the ground of newly discovered evidence."

* * * * *

The twenty-fifth exception is to the decision of the court denying the defendant's motion for a new trial on the ground of newly discovered evidence. In support of the motion on this ground several affidavits were filed covering three conversations alleged to have been had with the motorman Cook on March 21, March 29, and April 1, 1910. The affiants state that in said conversations said Cook admitted that he testified falsely at the trial of the case and declared that he had lied and perjured himself on the witness stand. The case seems to come clearly within the law as laid down by this court in *Dexter v. Handy*, 13 R. I. 474. In that case the court, Durfee, C. J. (pp. 475-6), said: "The ground of the petition is that these witnesses, after the trial was over, severally admitted that their testimony was untrue. The affidavits of persons who profess to have heard these admissions are filed in support of the petition, but no affidavits are produced from the witnesses themselves either admitting that their testimony was false or stating anything differently from their testimony, while, on the contrary, one of the witnesses, and he the most important, has given an affidavit denying that he ever made the admissions. If another trial were granted, the new

evidence would not be admissible in proof of the issue made by the defendant, but only to contradict or discredit the witnesses if they were again put on the stand by the plaintiff. A new trial is seldom granted for the introduction of newly discovered testimony, which goes merely to impeach the witnesses of the prevailing party. We confess that the petition does not commend itself to our minds. If the affidavits introduced by the petitioner are true, the witnesses have confessed themselves perjurers; and yet the petitioner, while he asks us to grant him a new trial on that account has not, so far as appears, taken any steps to have them prosecuted. It has been decided that a new trial on account of perjury will not be granted until after the perjured witness either has been convicted or is dead, mere evidence of the perjury, or even an indictment for it, being deemed insufficient. *Dyche v. Patton*, 3 Jones Eq. 332; *Benfield v. Petrie*, 3 Doug. 24; *Seeley v. Mayhew*, 4 Bing. 561; *Wheatly v. Edwards*, Lofft. 87. Perhaps the rule laid down in these cases may be too strict and exacting for all circumstances, but it is obviously founded in wise policy. Certainly the talk of a witness after trial ought not generally to weigh against the sworn testimony; for there would be no security for verdicts if without peril to the witnesses, they were liable to be upset by such talk. The best evidence of perjury is the conviction of the perjurer. It is against the petition that the petitioner can find no precedent for it. There is, however, precedent against it. In *Commonwealth v. Randall*, Thacher Cr. Cas. 500, it was held that expressions used by a witness after a trial, contradicting or denying what he said in court, are not ground for setting aside the verdict and for granting a new trial, but are evidence to convict him of perjury. 'In almost every instance,' said the court, 'it would be easy for a losing party to obtain affidavits of that description.' We must, therefore, refuse a new trial on this ground." The doctrine of this case has been followed in *Roberts v. Roberts*, 19 R. I. 349; *Jones v. N. Y., N. H. & H. R. R. Co.*, 20 R. I. 214; *Timony v. Casey*, 20 R. I. 257; and *State v. Lynch*, 28 R. I. 463. In the last mentioned case, the court, Douglas, C. J. (p. 465), said: "On examination of the affidavits submitted we find that they do not divulge any evidence upon the merits of the case, but are confined to at-

tempts to discredit the principal witness of the crime. They consist mostly of statements which this witness is said to have made contradictory of her story upon the stand. Such evidence, if well fortified, is not generally admitted to impeach a verdict, as we have frequently decided'' (citing the cases *supra*).

* * * * *

CHICAGO AND EASTERN ILLINOIS RAILROAD COMPANY V. STEWART.

Supreme Court of Illinois. 1903.

203 Illinois, 223.

MR. JUSTICE WILKIN delivered the opinion of the court:

This is an action of trespass on the case, brought by Robert Stewart against appellant, to recover damages on account of a personal injury sustained by him on the 30th day of December, 1899, occasioned by a collision between appellant's locomotive engine and the street car upon which appellee was a passenger, in the city of Chicago. The jury returned a verdict for \$1,358.40. Appellant made a motion for a new trial, which was overruled, and judgment was rendered upon the verdict. The railroad company now prosecutes a further appeal from a judgment of affirmance in the Appellate Court for the First District.

The only ground for reversal urged in this court is that the court below erred in overruling the defendant's motion for a new trial on the ground of newly discovered evidence. The claim for damages was for injuries to the plaintiff's spine, shoulder and arm. During the progress of the trial plaintiff testified that he had never received an injury before this accident. On cross-examination he was asked if he had not been injured some years ago in an accident on the Santa Fe railroad, to which he replied that he did not get hurt in that accident. He was then asked to hold up his left hand, which showed three fingers missing, and when asked as to the time of losing those fingers he replied that he did not remember when it was. After the verdict was

returned the claim agent of the appellant company made an investigation on the Santa Fe accident, and ascertained from the county hospital that on April 25, 1899, one "R. Stuart" had been taken to that hospital because of an injury to his hand. The agent then made an affidavit to the facts ascertained by him in his investigation, and counsel for appellant presented it to the court in support of the motion for a new trial. Counsel insisted that new evidence had been discovered which would tend to impeach the plaintiff and show that he had sworn falsely when he stated that he did not know when he received the injury to his hand. No claim is made in this cause for any injury to the hand, therefore the loss of the fingers was wholly immaterial to the issue in the case. It was, perhaps, proper, in the discretion of the court, to permit the cross-examination of the witness upon that subject for the purpose of discrediting him, but for no other purpose. The newly discovered evidence, therefore, even if it would have been competent upon the trial, tended only to impeach or discredit the plaintiff, and that upon a matter not material to the issue. It has been often decided by this court that a new trial will never be granted on the ground of newly discovered evidence merely for the purpose of impeaching a witness who testified upon the trial. (*Friedberg v. People*, 102 Ill. 160; *Grady v. People*, 125 id. 122; *Monroe v. Snow*, 131 id. 126; *Bemis v. Horner*, 165 id. 347; *Chicago and Northern Railway Co. v. Calumet Stock Farm*, 194 id. 9.) The motion for a new trial was therefore properly overruled.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

MOORE V. CHICAGO, ST. LOUIS AND NEW ORLEANS RAILROAD COMPANY.

Supreme Court of Mississippi. 1881.

59 Mississippi, 243.

COOPER, J., delivered the opinion of the court.

The appellant sued the Chicago, St. Louis & New Orleans Railroad Company to recover damages for an injury sustained by him in being forcibly ejected from one of its trains while the same was in motion. At the April Term of the Circuit Court of Marshall County there was a trial of the cause which resulted in a verdict and judgment for the plaintiff. The defendant moved for a new trial, which was granted, and thereupon the plaintiff excepted to the action of the court in granting the new trial, and a bill of exceptions was signed, embodying the evidence introduced. At the October Term of the court another trial was had, resulting in a judgment for the defendant. The plaintiff made a motion for a new trial, which was overruled; and the plaintiff again excepted, took another bill of exceptions, and now prosecutes this appeal, assigning for error the action of the court below in granting the new trial asked by the defendant, and in refusing that asked by himself. * *

The newly discovered evidence of that of a witness who, some days after the occurrences in which the plaintiff was injured, had a conversation with the conductor of the defendant, who the plaintiff testified had inflicted the injuries on him, in which conversation the conductor admitted to the witness that he had kicked the plaintiff from the train. It is apparent that these admissions would not have been admissible in evidence for any other purpose than that of impeaching the credibility of the conductor, who had testified on the trial as a witness for the defendant, and had stated that he had had no part in inflicting the injury on the plaintiff; for these declarations were not a part of the *res gestae*, and only on that ground could they bind the defendant. *Dickman v. Williams*, 50 Miss. 500; 1 Greenl. Evid. § 113; *Sisson v. Cleveland Railroad Co.*, 14 Mich. 489; *Smith v. Betty*, 11 Gratt. 752; *Thallhimer v. Brinckerhoff*, 4 Wend. 394; *Virginia Railroad Co. v. Sayers*, 26

Gratt. 328. But a new trial will not be granted on the ground of newly discovered testimony, the only effect of which would be to impeach the credibility of a witness. 3 Graham & Waterman on New Trials, 1074.

We are therefore of opinion that there is no error in the record, and the judgment is

Affirmed.

(c) *Necessary Diligence.*

NICHOLSON V. METCALF.

Supreme Court of Montana. 1904.

31 Montana, 276.

MR. COMMISSIONER CLAYBERG prepared the following opinion for the court:

This is an appeal by Metcalf from an order granting a new trial. The only ground of the motion for a new trial was newly discovered evidence. The only affidavit filed showing that evidence was newly discovered is that of plaintiffs. This affidavit, in so far as the discovery of the evidence and the showing of diligence in that regard is concerned, is as follows: "That subsequent to the trial of said cause, to-wit, on the 12th day of December, A. D. 1902, I have discovered evidence which will establish the fact that myself and my co-plaintiff is said action," etc. Then follows a statement of the evidence which has been discovered. The affidavit then continues: "I did not know of the existence of said evidence at the time of the trial, and could not, by the use of reasonable diligence, have discovered or produced the same upon the former trial. The name of the witness by which I can establish the facts herein set forth is E. A. Briggs, now residing at Centerville, in Silver Bow county, Montana; that I did not for eighteen years prior to the 12th day of December, A. D. 1902, know the whereabouts of said Briggs." The affidavit of Briggs also appears in the record, supporting the affidavit of plaintiffs as to the facts to which he would testify, and stating

that he was present and heard the conversation upon which plaintiffs' cause of action was based.

The statute concerning new trials provides as follows: "The former verdict or other decision may be vacated and a new trial granted on the application of the party aggrieved for any of the following causes materially affecting the substantial rights of such party * * * (4) Newly discovered evidence material for the party making the application which he could not with reasonable diligence have discovered and produced at the trial." (Section 1171, Code of Civil Procedure.)

We are of the opinion that the affidavit does not contain a sufficient showing of diligence, as contemplated by the statute, to warrant the order appealed from. (*Rand v. Kipp*, 27 Mont. 138, 69 Pac. 714; *Gregg v. Kommers*, 22 Mont. 511, 57 Pac. 92; *Caruthers v. Pemberton*, 1 Mont. 111; *Butler v. Vassault*, 40 Cal. 74; *Hendy v. Desmond*, 62 Cal. 260; *Bagnall v. Roach*, 76 Cal. 106, 18 Pac. 137; *Barton v. Laws*, 4 Colo. App. 212, 35 Pac. 284; *State v. Power*, 24 Wash. 34, 63 Pac. 1112, 63 L. R. A. 902; *Bradley v. Norris*, 67 Minn. 48, 69 N. W. 624; 1 Spelling on New Trial and Appeal, Secs. 209-218.)

Under these authorities it was incumbent upon plaintiffs to show that they had been guilty of no laches, and that failure to produce the evidence on the trial could not be imputable to lack of diligence on their part. They must make strict proof of diligence, and a general averment of its existence is insufficient. Whether reasonable diligence has been used is a question to be determined by the court upon the affidavits presented, and therefore these affidavits should state with particularity what acts were performed. They should show what diligence was used, how the new evidence was discovered, why it was not discovered before the trial, and such other facts as make it clear that the failure to produce the evidence was not their own fault, or because of want of diligence on their part. So far as the evidence presented in this case is concerned, the first search for evidence may have been made after the cause had been tried. If Briggs was present at the conversation, plaintiffs must have known it. Perhaps this fact escaped their memory at the time of the trial, but

mere forgetfulness is no excuse. (*Hendy v. Desmond*, 62 Cal. 260.)

The mere allegation that for eighteen years plaintiffs did not know the whereabouts of Briggs is insufficient. If plaintiffs knew that Briggs could testify in their behalf, they should have shown that they had exhausted the methods provided by law for obtaining the attendance of witnesses. If they did not know that Briggs could so testify, it is immaterial that they did not know his whereabouts.

While it is true that the granting or refusing of a motion for a new trial is largely in the discretion of the trial court, and its action will not be interfered with on appeal unless there is abuse of such discretion, the affidavits being defective in the showing of diligence, we are satisfied that the court below had no authority to grant the order, and therefore abused its discretion.

We therefore advise that the order appealed from be reversed, and the cause remanded.

PER CURIAM.—For the reasons stated in the foregoing opinion, the order is reversed and the cause remanded.

COFFER V. ERICKSON.

Supreme Court of Washington. 1911.

61 Washington, 559.

DUNBAR, J.—The appellant, Erickson, was under a contract with the city of Seattle for the regrade of Fourth avenue from Yesler Way north to Pike street. Fourth avenue runs northerly and southerly, and is crossed by Columbia street, running easterly and westerly. At the intersection of Columbia street and Fourth avenue, Fourth avenue had been cut down about thirteen feet, and in order to permit the going and coming of foot passengers upon Columbia street across Fourth avenue, the city had authorized the appellant to construct a wooden bridge, extending along the north side of Columbia street from the east side of Fourth avenue to the west side, spanning the entire Fourth avenue. The bridge was sixty-eight feet long, the

main part of it six feet wide, with extending floors three feet on each side, making the entire width of the bridge, so far as protection from anything below was concerned, about twelve feet. The appellant at the time of this accident, which was in September, 1908, had laid down two tracks upon which he operated trains of dump cars drawn by small locomotive engines, to carry the dirt from the northern portion of the work southerly; and these trains passed to and fro under this foot bridge. The respondent was a timber cruiser and had lived in that neighborhood for about a year. On the first of September, 1908, while walking down Columbia street he stepped upon this bridge, and while going across it, one of the appellant's engines carrying some empty dirt cars passed under the bridge and, according to respondent's complaint, puffed up or threw up on top of the bridge a cloud of cinders, one of which was thrown into respondent's eye, with the effect that, after a long treatment, the eye was lost; and this action is brought for damages for said loss.

* * * * *

It is also assigned that the court erred in not granting the appellant a new trial on the ground of newly discovered evidence. The application for new trial was based on the affidavit of John J. Jamison, a clerk in the office of the attorneys for the appellant, who swears that, as such clerk, he had sole charge of the investigation of the facts constituting a defense, and of the securing of witnesses and the preparation of the trial for the appellant; that effort had been made to obtain the names of the nurses at the hospital at the time of respondent's sojourn there, which had failed; that the nurse Anna Bonen had testified that, in irrigating the eye of the respondent, a cinder, about a quarter of an inch long, had been washed therefrom into the receiving basin, and that this cinder had been discovered by, and examined by, Sister Crescent, who was the chief nurse; that the existence of Sister Crescent was not known to the appellant prior to the time of this testimony, and that immediate steps were taken to obtain the testimony of said Sister Crescent, who was found to be in Colfax, Washington; that an affidavit had been obtained from her which, in effect, disputed the testimony of Miss Bonen in relation to the cinder, and that on account of this newly

discovered evidence, a new trial should be granted. But this testimony was adduced early in the case. Counsel had notice on the 2nd of February, by the testimony of the nurse Miss Bonen, that Sister Crescent was present when the particle was washed from the eye into the basin, and that Sister Crescent picked up the particle and examined it, and afterwards lost it. It also appears from the testimony of Dr. Burns, early in the case, that, while he was attending the respondent at the hospital, he was advised that this substance had been washed from the eye.

The granting of a new trial on the ground of newly discovered evidence is a question necessarily so largely in the discretion of the trial judge that it must appear with reasonable certainty that such discretion has been abused to the prejudice of the appellant, before the appellate court will substitute its judgment for that of the presiding judge, who has observed the proceeding throughout the trial. In this case, the judge might reasonably have concluded that due diligence had not been exercised by appellant's attorneys. The attending physician, Dr. Burns, indicated by his testimony that he was at least friendly to the defense. A consultation with him would, no doubt, have disclosed who the nurses were who attended on respondent while in the hospital, and it would seem, in a case of this kind, that due diligence would have required the ascertainment of that fact. Nor did it seem to have been any secret, for it readily developed in the trial, by the testimony of the nurse Miss Bonen and Sister Arthur, that Sister Crescent was the chief nurse during respondent's stay at the hospital. These were circumstances which the court might reasonably take into consideration, in connection with the claim of the clerk that he had been unable to ascertain who the nurses were. In addition to this, the appellant was informed of this transaction and of the fact that Sister Crescent witnessed it, in the early stage of the trial, viz., on February 2, and the trial was extended over February 4; and notwithstanding the fact that the affidavit sets forth "that the town of Colfax is about three hundred and fifty miles or more from the city of Seattle, and that it was utterly impossible to obtain an interview with, or the attendance of, Sister Crescent at said trial," no motion was made for a continuance and no suggestion of surprise. After

having knowledge of the facts complained of, the appellant offered his testimony and, at the close thereof, formally rested his case. He should not be permitted to submit his case on one set of facts and, if a verdict is found against him, obtain another trial on another set of facts which were known to him at the time of such submission. Such has been the uniform holding of this court where no continuance was asked for. *Pinous v. Puget Sound Brewing Co.*, 18 Wash. 108, 50 Pac. 930; *Woods v. Globe Nav. Co.*, 40 Wash. 376, 82 Pac. 401; *Reeder v. Traders' Nat. Bank of Spokane*, 28 Wash. 139, 68 Pac. 461.

Considering the whole case, we see no reason for disturbing the judgment. It is therefore affirmed.

RUDKIN, C. J., and CROW, J., concur. MORRIS, J., dissenting. CHADWICK, J., concurs with MORRIS, J.

WHITTLESEY V. BURLINGTON, CEDAR RAPIDS & NORTHERN RAILWAY COMPANY.

Supreme Court of Iowa. 1903.

121 Iowa, 597.

McLAIN, J. * * *

* * * * *

Complaint is made of refusal to grant a new trial on account of newly discovered evidence, but it is enough to say that such evidence related to matters of expert knowledge in regard to railroading, and could have been furnished by any expert witnesses, as well as by those named in the application. The showing was not sufficient to entitle plaintiff to a new trial in that respect.

* * * * *

The result is that judgment of the lower court is *affirmed*.

(d) *Probability of Change in Result.*PARSONS V. LEWISTON, BRUNSWICK AND BATH
STRET RAILWAY.*Supreme Judicial Court of Maine. 1902.**96 Maine, 503.*

SITTING: WISWELL, C. J., EMERY, WHITEHOUSE, STROUT,
PEABODY, JJ.

WISWELL, C. J. While the plaintiff was driving a horse attached to a long covered vehicle on runners across the bridge between the cities of Lewiston and Auburn, in the direction of Auburn, he met the defendant's rotary snow-plow coming towards him from Auburn; his horse became frightened at the appearance of the snow-plow and the noise caused by it to such an extent as to become unmanageable; finally, the horse bolted towards one side of the bridge, and, after striking that side, started diagonally across the bridge to the other side, the plaintiff in the meantime was thrown out, dragged some distance and sustained severe injuries.

The plaintiff, claiming that the accident was attributable to the negligence of the defendant's employees in the management of the snow-plow, brought this suit to recover the damages sustained by him. The trial resulted in a verdict for the defendant and the plaintiff brings the case here upon two motions for a new trial, one, because the verdict was against the weight of the evidence, the other upon the ground of newly-discovered evidence. The plaintiff's counsel admits in argument that the jury was authorized in finding a verdict for the defendant upon the evidence introduced at the trial, so that it only becomes necessary to consider the second motion and the newly-discovered testimony presented under it, in connection with the case as submitted to the jury.

The contention of the plaintiff at the trial was that his horse showed signs of fright when about one hundred feet distant from the snow-plow as the two were slowly approaching each other; that the fact that his horse was greatly frightened and was becoming unmanageable was so apparent that it should have been seen, and in fact was

seen, by the motorman a sufficient length of time before the horse bolted, for him to have stopped his plow, and allow the plaintiff to drive past; that by doing so the accident would have been avoided, but that he failed to stop the snow-plow and that this failure was the proximate cause of the accident resulting in the injury to the plaintiff. The defendant's answer to this proposition is, and was at the trial, that the motorman did stop his plow as soon as the horse showed any signs of fright. Defendant's counsel in their brief say, "coincident in point of time with the first appearance of real fright on the part of the horse, the motorman shut off the current, applied the brake, and stopped the plow."

Upon this issue, the plaintiff testified that the snow-plow did not stop until after the accident, and one witness called by him, whose means of observation on account of his distance from the scene of the accident were not particularly good, to some extent substantiated the plaintiff, stating it as his impression that the snow-plow did not stop. Upon the other hand, four witnesses called by the defense, all of whom were on the snow-plow at the time, and in the employ of the defendant corporation, and three of whom were still in its employ at the time of the trial, all testified in substance that the motorman stopped his plow as soon as the horse appeared to be frightened. A jury certainly would be authorized to find that it was negligence upon the part of those managing the rotary snow-plow, such as this one was described and shown by the photographs to be, to continue its movement along the track, in such a situation as this, when an approaching horse displayed signs of great fright and of becoming unmanageable. But, upon the other hand, the jury was authorized to find from the testimony in the case that the motorman seasonably stopped his plow, and did all that he could do to prevent the accident. So that the important issue of fact at the trial was, as to whether or not the plow was seasonably stopped, in view of the situation.

Since the trial the plaintiff has discovered three additional witnesses who saw the accident and who will testify, with varying degrees of positiveness, that the snow-plow did not stop until after the accident. These witnesses are entirely disinterested, they had no acquaintance with the

plaintiff, their opportunities for seeing what happened were good. The testimony of these three witnesses is newly-discovered within the well established rule in this state, its discovery subsequent to the trial was accidental; and the failure of the plaintiff or his counsel to be earlier aware of its existence cannot be attributed to any negligence upon their part, because diligence upon their part would not have been likely to have put them in possession of it.

The question then is, whether the court, in the exercise of its sound discretion, but within the rules which have been adopted relative to granting new trials upon this ground, should grant a new trial in this case. But first, inasmuch as there may be some confusion as to what the true doctrine is governing the court in the exercise of its discretion in cases of this kind, growing out of the language used in two decisions of this court, it may be well to carefully state it.

The true doctrine is, that before the court will grant a new trial upon this ground, the newly-discovered testimony must be of such character, weight and value, considered in connection with the evidence already in the case, that it seems to the court probable that on a new trial, with the additional evidence, the result would be changed; or it must be made to appear to the court that injustice is likely to be done if the new trial is refused. It is not sufficient that there may be a possibility or chance of a different result, or that a jury might be induced to give a different verdict; there must be a probability that the verdict would be different upon a new trial. But it is not necessary that the additional testimony should be such as to *require* a different verdict.

The correct doctrine had been so repeatedly stated by this court, that we quote the language used in numerous earlier decisions relative to the character of the newly-discovered evidence necessary and sufficient to justify the court in granting a new trial upon this ground. "A new trial to permit newly-discovered testimony to be introduced should only be granted * * * when there is reason to believe that the verdict would have been different if it had been before the jury." *Handly v. Call*, 30 Maine, 10. "Unless the court should think it probable the new evidence would alter the verdict." *Snowman v. Wardwell*, 32 Maine, 275. "A review will never be granted to let in additional testi-

mony, when such testimony would not be likely to change the result." *Todd v. Chipman*, 62 Maine, 189. "Nor unless there be reason to believe that it would change the result." *Trask v. Unity*, 74 Maine, 208. In *Linscott v. Orient Insurance Co.*, 88 Maine, 497, 51 Am. St. Rep. 435, the court stated the rule, citing various earlier cases, in these words: "It has long been the settled doctrine of this court that a new trial will not be granted on the ground of newly-discovered evidence, unless it seems to the court probable that it might alter the verdict." In *Stackpole v. Perkins*, 85 Maine, 298, nothing is said in the opinion in regard to the new evidence being of such a character as to require a different verdict. The court does say in that case: "If believed (the newly-discovered witness) his testimony must substantially destroy the evidence of a witness at the trial, whose testimony may have been considered of controlling weight." A new trial was granted in this case, although the effect of the newly-discovered testimony was stated by the court to depend upon the weight given to it by the jury.

It is true that in *Linscott v. Orient Insurance Company*, *supra*, where the correct doctrine of this state was very distinctly stated as above quoted, and in accordance with the previous authorities, the court, at the conclusion of the opinion said that the question was, "whether the legitimate effect of such evidence would *require* a different verdict." The case of *State v. Stain*, 82 Maine, 472, was cited in support of this doctrine. But we do not find the rule so stated in any case, other than in these two, in this state. If it were true that such new evidence must be of such a character as to *require* a different verdict upon a new trial, then it would follow as a logical sequence that none but a different verdict would be allowed by the court to stand. The rule thus stated in these two cases is too strict, it would deprive a party of the privilege of having his new evidence passed upon by a jury, whose peculiar province it is to decide controverted issues of fact, even in cases where the court is of opinion that the new evidence would probably change the result, or that injustice would be likely to be done if a new trial was not granted.

In this case we can not say that the new evidence, in connection with the former evidence, would require a dif.

ferent verdict. After this evidence is submitted it then becomes a question for the jury to pass upon. But it does seem probable to the court that the verdict will be different when the case is submitted anew with the additional evidence.

It is true that this evidence is cumulative, but it is not an absolute and unqualified rule that a new trial will not be granted under any circumstances upon newly-discovered cumulative testimony. *Snowman v. Wardwell*, 32 Maine, 275. When the newly-discovered evidence is additional to some already in the case in support of the same proposition, the probability that such new evidence would change the result is generally very much lessened, so that much more evidence, or evidence of much more value, will generally be required when such evidence is cumulative; but if the newly-discovered testimony, although merely cumulative, is of such a character as to make it seem probable to the court that, notwithstanding the same question has already been passed upon by the jury, a different result would be reached upon another trial with the new evidence, then such new trial should be granted.

The provision of the statute, R. S. c. 89, § 4, applicable to petitions for review, that "newly-discovered cumulative evidence is admissible and shall have the same effect as other newly-discovered evidence," should have some effect upon the value of such testimony upon a motion for a new trial; otherwise, a party who had lost a verdict would have greater rights upon a petition for review after judgment than upon a motion for a new trial before.

And after all, while it is important to have general rules in regard to the granting of new trials upon this ground, which may be known to the profession, and by which the court will be governed so far as practicable, each case differs so materially from every other, that the decision of the question as to whether or not a new trial should be granted in any particular case must necessarily depend, to a very large extent, but of course within the limits of such general rules, upon the sound discretion of the court, which will always be actuated by a desire, upon the one hand, to put an end to litigation when the parties have fairly had their day in court, and, upon the other, to prevent the likelihood of any injustice being done.

In the exercise of this discretion, and within the rules as above laid down, the court is of the opinion that this plaintiff should have the opportunity to again submit his case, with the additional testimony, to the determination of a jury.

New trial granted.

OBERLANDER V. FIXEN & CO.

Supreme Court of California. 1900.

129 California, 690.

THE COURT.—The appellant recovered judgment in the court below for damages (seventeen hundred and fifty dollars), resulting from her falling down a negligently constructed staircase leading from the defendant's storeroom, where she had just been employed by the defendant, to the basement. The court granted a new trial on the ground of newly-discovered evidence; and the grounds urged for reversal are: 1. That the affidavits were not served or filed in time; 2. Want of diligence on the part of defendant in preparation for trial; and 3. That the newly-discovered evidence was merely cumulative.

The first point presents no difficulty. The time allowed for defendant for filing affidavits was extended by order of court, and the affidavits were in fact filed more than thirty days beyond the statutory time; but an extension beyond thirty days is forbidden by the section 1054 of the Code of Civil Procedure only with reference to the cases therein enumerated; among which the filing of affidavits on motion for new trial is not included, with reference to which the power of the court to extend is given by section 659, subdivision 1. The case of *Smith v. Jordan*, 122 Cal. 68, cited by appellant's counsel, bears no analogy to the case at bar; and the rule therein referred to—established in *Flagg v. Puterbaugh*, 98 Cal. 134—has no application.

The other points may be conveniently considered together. Under the provisions of section 657 of the Code of Civil Procedure the requisites for a new trial on the

ground of newly discovered evidence are that the evidence could not, with reasonable diligence, have been discovered and produced at the trial, and that it shall be "material for the party making the application" (subdivision 4)—or, as previously expressed, shall be of a character "materially affecting the substantial rights of such party." The last requisite would seem to imply that the newly discovered evidence should be of such a character as to render a different result probable on a new trial; and accordingly such is held by the courts to be the established rule. (Hayne on New Trial and Appeal, 91.) Where these requisites occur they constitute sufficient grounds for new trial, and no others can be required.

Hence the rule, so often reiterated by the courts, that a new trial should not be granted where the evidence is merely cumulative, must be regarded (in this state) not as an independent rule, additional to those established by the provisions of section 657 of the code, but as a mere application of those rules, or, as it has been expressed, as "a corollary of the requirement that the newly discovered evidence must be such as to render a different result probable on a retrial of the case." (Hayne on New Trial and Appeal, sec. 90, pp. 255, 256.) For (continuing the citation) "it is evident that new evidence, although cumulative, might be of so overwhelming a character as to render a different result certain" (or probable); and in such case under the express provisions of the code a new trial should be granted. The rule should therefore be construed as simply holding that cumulative evidence is insufficient "unless it is clear such evidence would change the result." (*Levitsky v. Johnson*, 35 Cal. 41.) Hence, "a new trial should not be refused merely because the evidence is cumulative in a case where the cumulation is sufficiently strong to render a different result probable." That this is the true statement of the rule is established in the case last cited, and in *Von Glahn v. Brennan*, 81 Cal. 264, and in *O'Rourke v. Vennekohl*, 104 Cal. 256—from which the above language is quoted; and it is so in effect held in *People v. Standford*, 64 Cal. 27.

Whether the evidence is of this character is not a question of law but for the judgment of the trial judge, whose discretion will not be interfered with by this court except

in cases of manifest abuse. Hence, where the motion is denied, the fact that the newly discovered evidence is merely cumulative will in general be a sufficient ground for affirmance; but where the motion is granted, the contrary will hold. For, in either case, it is for the trial judge to determine whether the evidence is of character probably to affect the result on a new trial; and unless the evidence be of such a character as to make it manifest and certain to this court that in the one case it would, or in the other that it would not, result differently on a retrial, the order will not be disturbed. The present case, we think, comes within the principles above laid down, and it will, therefore, in the view we take of the case, be unnecessary to determine whether the newly discovered evidence was in fact cumulative or otherwise.

Whether in this case the evidence could with reasonable diligence have been discovered and produced at the trial was also a question upon which the judgment of the court below must be regarded as conclusive, unless it appear that his discretion has been abused; and on this point we think the moving party made a sufficient case. (*Jones v. Singleton*, 45 Cal. 92.)

Counsel for appellant, on the construction they put on the affidavit of A. H. Fixen, make a very strong case, and could we agree in that construction our conclusion might be different; but our view of the terms of the affidavit is different. It reads: "I am the treasurer of the defendant corporation and as such had particular charge of arranging defendant's defense to this action subsequent to the trial of said cause, to-wit, on or about the first day of June, 1896, and for some time thereafter, I have discovered evidence," etc. This is construed by the counsel as saying that affiant had charge of the defense "subsequent to the trial" only. But, obviously, this construction cannot be entertained, and we must construe the affidavit as though "subsequent" were written with a capital initial, and a period inserted after "action." (Bouvier's Law Dictionary, word "Punctuation.") Thus construed, the affidavit clearly states that the affiant had charge of the defense and shows that he used reasonable diligence in preparing for it. Nor does it appear that the newly discovered evidence

was of a character "to put defendant upon inquiry." (*Heintz v. Cooper*, 104 Cal. 671.)

The order granting a new trial must therefore be affirmed, and it is so ordered.

Hearing in Bank denied.

ELLIS V. MARTIN AUTOMOBILE COMPANY.

Supreme Court of New Jersey. 1909.

77 New Jersey Law, 339.

On rule to show cause.

The opinion of the court was delivered by

TRENCHARD, J. The plaintiff, Alfred L. Ellis, was the owner of an automobile. The defendant ran a garage, with a repair department, at Plainfield. On June 18th, 1907, the plaintiff left his automobile at the defendant's garage for repairs. Certain repairs, hereinafter more particularly stated, were made. Later, when the plaintiff called for the machine, the company declined to let him have it unless he would pay the bill for the repairs, which he declined to do. Thereupon the plaintiff caused to be issued a writ of replevin. The defendant company gave bond and held the car, and this suit resulted. The jury found a verdict for the plaintiff, whereupon the defendant obtained this rule to show cause why a new trial should not be granted upon the ground of newly-discovered evidence.

According to the plaintiff's testimony at the trial the automobile was left with the defendant company only for the purpose of having an old tire retreaded. According to the testimony on behalf of the defendant company it was there for general repairs.

It was undisputed that in fact the car was repaired generally by the defendant company, including repairs to, and new parts for, the engine. But it was contended by the plaintiff that the machine was in good condition when left with the defendant, and that no repairs were necessary and none were ordered excepting that to the tire, and that the repairs to, and new parts for, the engine were rendered necessary only by the negligence of the defendant company

in handling the machine while in their care.

It will thus be seen that the condition of the plaintiff's car when it was left with the defendant was material to the issue, not only as bearing upon the value of the car, but as tending to show for what purpose it was left with the defendant and what repairs were ordered by the plaintiff.

In order to support his contention that it was in good condition the plaintiff testified that he was a physician in active practice; that he had purchased the car in April, 1907, and had used it continuously in his practice from that time until June 18th, 1907, when he took it to the defendant to have the tire retreaded; that he never had any difficulty with it; that it was in good condition when he bought it and was in good condition when he left it with the defendant.

On the other hand, the witnesses called by the defendant company testified in effect that the car was badly in need of repair when it was brought to them, and that the repairs to the engine were rendered necessary by its condition when they received it and not to any negligence upon their part.

At the trial the plaintiff, after testifying that he had owned and driven the car since April, 1907, further stated that he had purchased it of the Manhattan Storage Company of New York.

The newly-discovered evidence is to the effect that in fact the car was bought by the plaintiff on June 14th, 1907 (but four days before it was left at the garage), and that it had never been in his possession before that time; that it was then four years old and was sold as it stood on the floor, without demonstration and without guarantee, and that its value was much less than that stated by the plaintiff on trial.

With respect to this evidence it is sufficient to say that it has in fact been discovered since the former trial; that, by the use of reasonable diligence, it could not have been then obtained; that much if not all of it is material to the issue and goes to the merits of the case and is not cumulative. Under these circumstances, the motion for a new trial ought not to be denied. *Dundee Manufacturing Co. v. Van Riper*, 4 Vroom 152; *Kursheedt v. Standard Bleachery Co.*, ante p. 99.

Let the rule to show cause be made absolute.

SECTION 8. EFFECT OF STATUTES ENUMERATING GROUNDS.
ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY
V. WERNER.

Supreme Court of Kansas. 1904.

70 Kansas, 190.

The opinion of the court was delivered by

JOHNSTON, C. J.: An action was brought by Emil Werner against the St. Louis & San Francisco Railroad Company to recover damages for an alleged diminution in the value of his property, caused by the construction of a railroad on a city street in front of the property. The railroad company answered that the building of the road in the street was legally and properly done, and that it did not interfere with ingress to, or egress from, the property, and occasioned the plaintiff no injury. A trial was had, in which the court charged the jury as to the measure of recovery, and, among other things, suggested that if the value of the property was enhanced by the building of the railroad, the increased value might be set off against any injury sustained by reason of the obstruction to the entrance to the property. The jury found that the value of the property was not affected by the building of the railroad, and a general verdict was given in favor of the defendant.

Plaintiff moved for a new trial, assigning all the statutory grounds, including the one last mentioned in section 306 of the code (Gen. Stat. 1901, § 4754), to-wit: "Error of law occurring at the trial, and excepted to by the party making the application." The motion was overruled as to all the grounds stated, but because of the instruction authorizing the jury to counterbalance damages suffered with benefits received the court granted a new trial. In disposing of the motion the trial court remarked that there was evidence in the case justifying the giving of the instruction, if it had been a correct statement of the law, but held that the instruction was not a correct declaration of the law, and granted a new trial for that reason alone.

It appears from the record, however, that the instruction

in question, as well as the entire charge, was given to the jury without objection or exception. Can a party sit by and listen to the giving of an instruction without objection or exception, and, after the case has been fully submitted and an adverse verdict returned, obtain a new trial because of the giving of such instruction? We think not. A new trial may be allowed only on the grounds specified in the statutes. The giving of an erroneous instruction is an error of law occurring at the trial; but such error gives no ground for setting aside a verdict unless an exception has been taken to the giving of it. The grounds for a new trial provided for in the code are specific and exclusive. The only ground having any application to the question before us is the eighth one mentioned in section 306 of the code, to wit: "Error of law occurring at the trial, and excepted to by the party making the application." To make such an error available there must be an exception. It has been said that "a party has no abstract, inherent right to a new trial. He has a right because and so far only as the statute gives it to him * * *. If he fails to pursue this mode he loses the benefit of any errors on the trial, and is concluded as to all matters occurring at the trial." (*Nesbit v. Hines*, 17 Kan. 316.)

It was held in *Sovereign Camp v. Thiebaud*, 65 Kan. 332, 69 Pac. 348, that a trial court cannot set aside a verdict and grant a new trial arbitrarily and without reason; and, it may be added, it can never be done except for a statutory reason. In *Publishing House v. Heyl*, 61 Kan. 634, 60 Pac. 317, it was held that statutory remedies and methods supersede previously existing ones, and, the legislature having provided a method for obtaining a new trial, a party desiring one must conform to the prescribed requirements. Since the plaintiff took no exception to the instruction given, he is deemed to have acquiesced in it; and, assuming that it was erroneous, the lack of exception made the error unavailable and afforded no ground for setting aside the verdict and granting a new trial. (*Darrance v. Preston*, 18 Iowa, 396; *Valerius v. Richard*, 57 Minn. 443, 59 N. W. 534; *Hayne*, New Trial & App. § § 7, 127.)

To overcome this omission plaintiff calls attention to a recital in the case made that it contains all the pleadings

and proceedings, "together with all the instructions given by the court and the objections made by either party, together with all rulings of the court and all papers filed in said case necessary to present the question raised and enable the supreme court to pass upon one question raised in the record, to wit: The giving by the court of the instruction complained of by the plaintiff, and for the giving of which a new trial was granted." The recital does not affect the question under consideration. The question whether the giving of the instruction was a ground for a new trial is presented, and assuming that the record contains all that it is said to contain, the question remains: Did the giving of an erroneous instruction, without objection or exception, warrant the granting of a new trial? We think not; and, therefore, the order granting a new trial must be reversed, and the cause remanded with instructions to enter judgment for the plaintiff in error.

All the justices concurring.

VALERIUS V. RICHARD.

Supreme Court of Minnesota. 1894.

57 Minnesota, 443.

COLLINS, J. At the trial of this cause, at the request of defendants' counsel, the court plainly charged the jury that, if they found a certain fact from the evidence, the defendants could not be held liable upon the note in suit. To this, counsel for plaintiff took no exception, nor was there even a suggestion that it was erroneous. The verdict being for defendants, a motion to set it aside, and for a new trial, was made by plaintiff's attorneys, on two grounds,—those specified in 1878, G. ch. 66, § 253, subd. 5th and 7th. Subsequently, and, as stated by the court in its order, solely because there was no evidence which warranted that part of the charge referred to above, plaintiff's motion was granted.

* * * * *

The majority are of the opinion that, in civil actions, the

power of the court to grant new trials is limited to the grounds prescribed in section 253, and that new trials for errors of law can only be granted when an exception has been taken. The statutory grounds for new trials are exclusive. Practically, this has oftentimes been held in this court, especially when considering motions made upon the ground that errors of law had occurred upon the trial, as witness the Minnesota cases before referred to. To permit a defeated party to have the benefit of an error of law not excepted to would be giving him a great advantage; and here we are asked to go further, and allow to a party who made no objection to the giving of the erroneous instruction, and thereby actually acquiesced in its pertinency and correctness, the benefit of the error. Manifest injustice would be the result, for, had even a suggestion been made that the court was not justified in this part of the charge, we have no doubt prompt correction would have followed. Our construction of the statute has been placed upon others substantially the same. See Hayne, New Trials, ch. 1, §7; Id. ch. 16.

Order reversed.

BUCK, J., absent, sick, took no part.

CANTY, J. I dissent. Where the trial court has misstated the law in his charge, or charged propositions of law not applicable to the case, and he is of the opinion that in fact the jury was misled thereby, it is in his discretion to grant a new trial though no exception was taken, if, in his opinion, the taking of an exception would not have caused him to change his mind in time to obviate the mistake. In such a case the losing party has no standing at all, as a matter of right. It is merely an application for equitable relief, addressed peculiarly to the discretion of the trial court.

In New York this is carried so far as to hold that, on review at the general term of the rulings of the judge at the trial, the want of an exception is not necessarily fatal, but the general term may, in its discretion, reverse for error not saved by exception, on the ground that it is not, strictly speaking, exercising appellate jurisdiction, but has all the discretionary powers of the trial court. Baylies, New Trials & App. 125; *Standard Oil Co. v. Amazon Ins. Co.*, 79 N. Y. 506; *Mandeville v. Marvin*, 30 Hun. 282;

Maier v. Homen, 4 Daly, 168; *Lattimer v. Hill*, 8 Hun. 171; *Ackart v. Lansing*, 6 Hun. 476.

It is also in the discretion of the trial court to allow an exception after the jury has retired. *St. John v. Kidd*, 26 Cal. 267. If he has power to allow an exception after the proper time to take it, he has power to consider it taken for the purpose of a new trial.

This ground for new trial does not come under 1878, G. S. ch. 66, § 253, subd. 7, "Error in law occurring at the trial and excepted to by the party making the application," but under the first subdivision of that section, "Irregularity in the proceedings of the court, jury, referee or prevailing party or any order of the court or referee or abuse of discretion by which the moving party was prevented from having a fair trial."

The discretionary power exercised by the court below in this case is one which a trial court, having due regard for the rights of the prevailing party will seldom exercise. It is only when he is satisfied that in fact the particular mistake produced a wrong result and that the failure to except did not prejudice the prevailing party and where he is satisfied that his rulings would have been the same and that nothing would have been done by him or the prevailing party in time to obviate the mistake even if an exception had been taken. Even viewed by this strict rule I cannot see that the order granting a new trial was an abuse of discretion, and hold that the order appealed from should be affirmed.

Since the above was written the majority opinion has been re-written. It is now admitted that at common law it was in the discretion of the trial court to grant a new trial for errors to which no exception was taken, but it is insisted that by the adoption of the Code this discretionary power has been cut off. It has seldom before been held that the discretionary power of a trial court of general jurisdiction has been cut off by the Code. The Code is a mere skeleton, and much of it merely declaratory of the common law. Especially is this true as to its provisions regulating practice. We do not look to it for the discretionary powers of the District Court, as we do to the justice of the peace practice act for the discretionary power of that court. On the contrary, it is not unusual to

look to the great sources of authority on common law and equity practice to ascertain what the discretionary powers of our District Court are.

The point is also now made for the first time that the motion for a new trial was not made on the grounds stated in the first sub-division of section 253, but on those stated in the fifth and seventh subdivisions. As to this I will say many able judges, in times past, have often set aside verdicts on their own motion, even before the ink was dry on them, and without any motion or grounds of motion being made or stated by the party at all; and the right to do so has hardly been questioned. At common law the trial court had the power to grant a new trial, no matter how informal the application for it might be, or how much the moving party had waived his technical rights by failing to take the proper exception, or to put the proper grounds, or any grounds at all, in his motion. When, as in the present case, a formal motion for a new trial is made, stating the grounds, it will not be presumed that it was granted on any grounds except those stated. It must affirmatively appear that it was granted on some other grounds which it does in this case. It is a new doctrine that a trial court of general jurisdiction has no discretion to brush aside technical informalities, and prevent injustice, by granting a new trial. It has always been held that it is in the discretion of the trial court to see that injustice was not done during the progress of a trial, or afterwards, before the entry of judgment, either through its own mistakes or the technical laches of the attorney. To sustain the position of the majority, Hayne, New Trial, is cited several times. This work is devoted exclusively to the practice as established by the California Code and decisions, rarely citing any other cases. He cites no case which sustains their position. They cite none, and I am able to find none. On the contrary, the authorities in the Code states agree with the common law on this question. Thus, in *Farr v. Fuller*, 8 Iowa, 347, the trial court granted a new trial for errors in its charge, not excepted to. The supreme court held it was discretionary. As in this case, the evidence was not returned on appeal, and the appellant claimed that no error appeared in the charge; but the supreme court held that, in favor of the order granting a new trial, it would be pre-

sumed that, as applied to the evidence, the charge was erroneous. It is also held in *Cheatham v. Roberts*, 23 Ark. 651, that it is in the discretion of the trial court to grant a new trial for error not excepted to.

The point is also now made that section 254 provides that when the motion for a new trial is made on the fourth, fifth, and seventh subdivisions of section 253, "it is made either on a bill of exceptions or a statement of the case prepared as prescribed in the next section, for any other cause it is made on affidavit," and that, therefore, this by necessary implication cuts off the common-law practice, under which the court often acted on its own knowledge of what took place in its presence during the trial, and granted or denied a new trial without regard to whether or not such knowledge was either supported or contradicted by any such affidavits. If this was purely a statutory proceeding, the position of the majority would be correct, but it is not a mere statutory proceeding. The provision that in some cases a motion for a new trial shall be made on a case or bill of exceptions and in others on affidavit, is simply declaratory of the common law. Such statutes do not cut off other common-law remedies, unless such other remedies are expressly prohibited. Thus, on the principles laid down by the majority, title 11 of chapter 66, prescribing the practice on application for injunction, and providing only for the temporary writ and the permanent writ, would, by necessary implication, cut off the old equity power to issue a restraining order pending the motion, but the contrary practice is well established in this state. On the same principle, on an appeal from the clerk on taxation of costs under 1878 G. S. ch. 67, § 8, the judge who tried the case could not look into the proceedings on the trial, or beyond the affidavits used on the taxation. But the contrary practice is well established. The judge practically disregards the affidavits on the question of materiality when the witnesses were sworn, and acts on his own knowledge of the proceedings had and testimony given on the trial, just as he did at common law. It is unnecessary to multiply illustrations. The judge who tried the case is not bound, by virtue of the statute, to know as little about the case after trial as the average juror is required to know before it. He is not obliged to stultify himself, and know nothing of

what he saw or heard on the trial, except what the parties see fit to state to him in affidavits.

But the judge's powers and the applicant's rights are, in this respect, very different questions. The moving party not only fails to save his rights for review in the appellate court, by failing to make them appear of record, and to cover them in his grounds of motion, but he also runs the risk of having his motion denied on technical grounds, merely, by the trial court, which it usually will and ought to do. But notwithstanding this, in furtherance of justice, the trial court may relieve him from his laches, by giving him something which he asked for, but was not in a position to demand as of right. And when it affirmatively appears that the court, in granting him a new trial, has, in furtherance of justice, intentionally relieved him from his technical laches and omissions, it is merely a question whether or not, on common-law principles, it has abused its discretion. In this case it seems to me that it has not.

BOTTINEAU LAND & LOAN COMPANY V. HINTZE.

Supreme Court of Iowa. 1911.

150 Iowa, 646.

Action at law on a promissory note. After both parties had offered their evidence and rested plaintiff moved for a directed verdict on the ground that there was a failure of proof of the matters pleaded in defense to the note. This motion was sustained, and a directed verdict returned for plaintiff for the amount of its demand. Thereafter and within three days defendant filed a motion for a new trial, assigning as reasons therefor errors of the court in holding there was no evidence to sustain the defense pleaded, as well as in numerous other rulings with reference to the pleadings and the admission and rejection of evidence. The trial court, after due consideration, sustained the motion, set aside the verdict, and ordered a new trial, accompanying the ruling by a written statement that some of the material evidence had escaped its attention until

the same had been transcribed after the verdict was returned, and that, upon a re-examination of the testimony, it was of the opinion that the issues should have been submitted to the jury. From this ruling, the plaintiff appeals.—*Affirmed.*

WEAVER, J. * * *

1. Counsel for plaintiff make the point that a motion for a new trial will not lie after a directed verdict of the jury has been received, and that to sustain such a motion is reversible error, even though the order directing the verdict was erroneously made. A "new trial" is defined by Code, section 3755, to be a re-examination in the same court of an issue of fact or some part or portion thereof after a verdict by the jury, report of referee, or a decision of the court. The objection raised by the appellant seems to be grounded in the thought that a directed verdict is not a "verdict of a jury" within the meaning of this statute, and that "decisions by the court" which may be questioned in motions for a new trial include only such as are made by a court in the trial of issues without a jury. In other words it is argued that an error in directing a verdict can be corrected only upon appeal. We think this contention requires an altogether too narrow construction of the statute, and that the establishment of such a rule would tend to prolong litigation, and increase its hazard and uncertainty. There is nothing inhering in our system of procedure and practice which forbids the exercise by a trial court of power to correct its own error where the mistake is discovered and the correction made at the same term, and while the parties and the subject-matter of controversy are still within its jurisdiction. *Chapman v. Allen*, Morris, 23; *Railroad Co. v. Estes*, 71 Iowa, 605; *Brace v. Grady*, 36 Iowa, 352. The statute provides for new trials after a verdict by a jury. It does not attempt to classify verdicts or draw any distinction between those returned by direction of the court and those which are not, and we see nothing in the nature of the case to compel the court to ingraft such an exception upon the rule as laid down by the Legislature. When the court submits an issue to a jury with erroneous instructions that as a matter of law plaintiff has failed to make a case or that defendant has failed to sustain his defense, thereby com-

PELLING a particular verdict, no good reason exists why that error may not be taken advantage of on motion for a new trial precisely the same as if the verdict had been actually or presumably affected by the erroneous exclusion of material evidence properly offered on the trial. The cases cited by appellant might be considered in point were we to recognize the distinction which counsel draw between verdicts generally and directed verdicts, but this we can not do, and we need not stop to consider what would be the proper practice in the absence of statutory regulation. It has frequently been held that power to grant new trials is inherent in the court, and that statutes such as ours do not abrogate or limit judicial authority in that respect. See cases collected in 29 Cyc. 722. Were it necessary to look beyond the provisions of our own statute and consult precedents from other states, they appear to be in substantial accord with the conclusion here announced. Bearing in that direction, see *Railroad Co. v. Goodrich*, 38 Kan. 224 (16 Pac. 439); *Chamvers v. Grantzon*, 7 Bosw. (N. Y.) 414; *Hinote v. Simpson*, 17 Fla. 444; 29 Cyc. 752.

* * * * *

There was no reversible error in setting aside the directed verdict, and the order appealed from is *affirmed*.

SECTION 9. ON COURT'S OWN MOTION.

FORT WAYNE & BELLE ISLE RAILWAY COMPANY
V. WAYNE CIRCUIT JUDGE.

Supreme Court of Michigan. 1896.

110 Michigan, 173.

MONTGOMERY, J. One Emma L. Long brought an action against the relator for personal injury, and, on a trial before a jury, recovered a verdict of \$800. The respondent, deeming this award insufficient, set aside the verdict, and ordered a new trial. The relator asks for a writ of *mandamus* directing that this order be set aside.

The counsel for relator concede that the court might, for

an error of its own commission on the trial, order a new trial on its own motion, but contend that the court has no such control over verdicts of juries, and can only vacate such verdicts on application of one of the parties. We think the practice in this State has been otherwise, from its earliest history, and although the exercise of this power has been very rare, there have been instances of it. That these instances must, of necessity, be infrequent, naturally results from the recognized impropriety of a trial judge interposing his own judgment, as against that of a jury, except in a clear case. But in such case the court possesses the power, at common law, to grant a new trial on its own motion; and in our opinion the power is not limited to cases where the error is that of the court, or where there is misconduct of the jury, as contended by relator's counsel, and as appears to have been held by the supreme court of Texas in *Lloyd v. Brinck*, 35 Tex. 1. As sustaining the broader power, as a common-law power, see 2 Thomp. Trials, § 2711, and cases cited,—particularly, *State v. Adams*, 84 Mo. 313.

Having determined that Judge Donovan had the power to set aside this verdict, it follows that his discretion must control his action, except in a case of clear abuse of such discretion, which we do not find in this case.

The writ will be denied.

HOOVER and MOORE, JJ., concurred. LONG, C. J., did not sit. GRANT, J., took no part.

HENSLEY V. DAVIDSON BROTHERS COMPANY.

Supreme Court of Iowa. 1907.

135 Iowa, 106.

LADD, J. The law of the case was settled on the former appeal (103 N. W. 975); and, whether right or wrong, that ruling in so far as applicable to this case is a part of the irrevocable past. That adjudication is binding on the parties, and it was the imperative duty of the district court to follow it. The evidence was substantially the

same as that introduced on the former trial; the only difference being that plaintiff testified that she saw the defendant's team before getting out of the wagon to go to the depot, concerning which no inquiry had been made before, and some variance in McDaniel's testimony bearing on his credibility as a witness. The records differ in no important particulars, such as might be persuasive that a different conclusion with reference to the submission of the cause to the jury should be reached.

No objections or rulings of any kind prior to the submission of the cause to the jury are to be found in the record, and no exceptions to the instructions were saved. Nevertheless, when the jury returned into court with a verdict for the plaintiff, the court "immediately upon reading said verdict, on its own motion," set it aside. Had this been done to correct some ruling in the course of the trial not necessary to challenge by motion in order to be renewed, a different question would be presented; but nothing previous had occurred to which the able counsel on either side had thought it worth while to save an exception. The ruling must have been owing to some supposed error lurking in the verdict which might have furnished the basis of a motion for new trial by the party aggrieved. An omission to so raise it would have been a waiver. For all that appears from the record, such might have been defendant's purpose. Our statute enumerates the grounds on which new trials shall be granted on application of the aggrieved party. Section 3755, Code. But there is no provision in the Code relating to orders of this kind on the court's own motion. That such right exists, however, is indisputable. It is one of the inherent powers of the court essential to the administration of justice. In *Rex v. Gough*, 2 Doug. 791, Lord Mansfield declared that, even though too late for a motion, if enough appeared, the court could grant a new trial, and in *Rex v. Atkinson*, 5 Term R. 437, note, is quoted as saying that, though too late for a motion, "if the court conceive a doubt that justice is not done, it is never too late to grant a new trial." In *Rex v. Holt*, 5 Term R. 436, Lord Kenyon, said he well remembered *Rex v. Gough*, "where the objection to the verdict was taken by the court themselves," and Buller J., observed, in concurring, that "after four days

the party could not be heard on motion for new trial, but only in arrest of judgment; but if, in the course of that address, it incidentally appear that justice has not been done, the court will interpose of themselves." In *Weber v. Kirkendall*, 44 Neb. 766 (63 N. W. 35), it is said that the power of courts of general jurisdiction, in the correction of errors committed by them, "is exercised, not alone on account of their solicitude for the rights of litigants but also in justice to themselves as instruments provided for the impartial administration of the law." And such is the view generally entertained by the courts in this country. *Allen v. Wheeler*, 54 Iowa, 628; *Ellis v. Ginsburg*, 163 Mass. 143 (39 N. E. 800); *Standard Milling Co. v. White Line Central Transit Co.*, 122 Mo. 258 (26 S. W. 704); *State ex rel. Henderson v. McCrea*, 40 La. Ann. 20 (3 South. 380); *Bank of Willmer v. Lawler*, 78 Minn. 135 (80 N. W. 868); *Com. v. Gabor*, 209 Pa. 201 (58 Atl. 278); *Thompson*, Trials, 2411; *State ex rel. Brainerd v. Adams*, 84 Mo. 310.

In the last case the court, in upholding the power, pertinently inquired: "If the court commits a palpable error in an instruction to the jury, or witnesses misconduct of members of the jury, which, on motion, would authorize it to set aside the verdict, shall it on account of the ignorance or timidity of the aggrieved party which prevents him from moving in the matter, render an unjust judgment on the verdict? If the jury find a verdict palpably against the law as declared by the court, is it powerless to maintain its own dignity and self-respect, unless some one who feels aggrieved shall move in the matter?"

In several of the States the grounds on which the courts may act on their own motion in granting a trial are specified by statute construed by the courts to exclude all others. *Townley v. Adams*, 118 Cal. 382 (50 Pac. 550); *Clement v. Barnes*, 6 S. D. 483 (61 N. W. 1126); *State ex rel. Brainerd v. Adams*, *supra*. Where the authority is found in the statutes the consensus of opinion seems to be that the ruling must be entered promptly upon the return of the verdict. *Clements v. Barnes*, *supra*; *Gould v. Elevator Co.*, 2 N. D. 216 (50 N. W. 969). See *Long v. Kingfisher Co.*, 5 Okl. 128 (47 Pac. 1063); 14 Ency. P. & P. 932. And several courts have indicated without deciding that

the order must be entered within the time within which a motion for new trial must be filed. That a motion therefor is pending will not deprive the court of the power to order a new trial on grounds not raised therein. This must necessarily be so, for one of the controlling reasons for the existence of the power is to enable the court to guard the rights of parties, who, for some cause, have proven unable to protect themselves, and another to enable the court to correct its errors rather than wait for this to be done by the Appellate Court. But resort to this power will rarely be required, and it should be exercised with great caution and in aggravated cases only. Ample provisions are to be found in the Code of Procedure for the protection of litigants on their own application, and for the court to interpose, without affording the defeated party an opportunity to elect, whether he will accept the result, lays it open to the suspicion of partisanship. It is preferable to leave something to the attorneys engaged in the litigation.

Especially was this true in the case at bar, as judgment therein for the defendant on a directed verdict had been reversed by this court, and the evidence held to be such as to require that the issues be submitted to the jury. Of what force is the opinion of this court that a case is made out for the jury if the district court can evade the ruling by setting aside the verdict when returned, and even then with the scant consideration evidenced by not waiting for objection by the losing party? If this can be done once, it may be repeated, and through orders granting new trials the effect of the decision entirely obviated. The rule which precludes this court from reviewing, revising, or reversing a decision on a former appeal is equally binding on the district court. *McFall v. Railway*, 104 Iowa, 50; *Babcock v. Railway*, 72 Iowa, 199; *Garretson v. Ins. Co.*, 92 Iowa, 295; *Burlington, Cedar Rapids & N. R. Co. v. Dey*, 89 Iowa, 24.

If, then, a new trial was granted on the same ground on which a verdict for defendant was directed on the former trial, the ruling cannot be sustained. Upon great consideration this court held in *Meyer v. Houck*, 85 Iowa, 319, that the trial judge should direct a verdict whenever, considering all the evidence, it would be his duty to set aside

the verdict if returned in favor of the party upon whom the burden of proof rested. The converse of this proposition necessarily follows; that is, a new trial ought not to be granted when the evidence in favor of the party having the burden of proof is such that the cause should be submitted to the jury. On the former appeal we held that the cause should have been submitted to the jury, and this in effect was an adjudication that a verdict, if returned for plaintiff, would have such support in the evidence as to preclude the granting of a new trial on that ground alone. Any question of presumption ordinarily indulged in favor of the ruling of the trial judge or discretion in the matter of granting new trials is obviated by the record. The record is conclusively presumed to contain everything essential to the determination of all points raised in argument. *McGillivray Bros. v. Case*, 107 Iowa, 17; *King v. Hart*, 110 Iowa, 618.

The order is reversed and the cause remanded for judgment on the verdict.—*Reversed*.

SECTION 10. DISCRETION OF COURT.

LOFTUS V. METROPOLITAN STREET RAILWAY COMPANY.

Supreme Court of Missouri. 1909.

220 Missouri, 470.

GRAVES, J. * * *

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* * * After verdict was returned the defendant filed its motions for new trial and in arrest of judgment, which motions were by the court sustained by an order of record in this language: "Now on this day it is ordered by the court that the motion for a new trial and motion in arrest of judgment be and the same are hereby sustained because the court erred in giving instruction 'No. One P.' to which the plaintiff excepts."

* * * * *

11. The further contention is made that this court should not disturb the discretion exercised by the trial court in granting the new trial. In other words, that the granting of a new trial rests within the sound discretion of the trial court. In the broad sense, the granting of a new trial does rest within the sound discretion of the trial judge, and this discretion, like all judicial discretions, should not be disturbed when properly exercised. We are cited to the recent cases of *Rodan v. Railroad*, 207 Mo. l. c. 407, and *Seeger v. Silver Co.*, 193 Mo. l. c. 407, as stating correct rules upon the question.

In the latter case, Judge Marshall said: "The rule is now well settled in this State that this court will not reverse the action of a trial court in granting one new trial, unless the case is such that no verdict in favor of the party to whom the new trial is thus granted, could, under any circumstances, be permitted to stand."

And in the former, Judge Lamm said: "In the first place, *in limine*, it must be assumed as a commonplace of the law, arising to the level of an axiom, that the granting of a new trial rests within the sound discretion of the trial court; and its action in that behalf will not be disturbed on appeal unless it appears that its discretionary power was abused, i. e., exercised in an arbitrary or improvident manner. (R. S. 1899, sec. 800; and see first note under that section, Ann. Stat. 1906, 761, where the authorities are gathered.)"

These announcements must be taken in the light of the facts of the cases. In the *Seeger* case the trial court had sustained a demurrer to plaintiff's testimony and thereby forced a nonsuit. Motion was made to set aside the nonsuit and that motion sustained by the court *nisi*, from which order the defendant appealed. Upon such an appeal Judge Marshall used the language above quoted. It must be noted that the sole question before the trial court and this court was the sufficiency of the evidence to make a case for plaintiff. At first blush, the trial court thought not, but upon considering the motion to set aside the nonsuit reached a different conclusion. The discretion exercised then was one as to the facts, and not one purely and simply of law. So, too, in the *Rodan* case. The trial court concluded, upon motion for new trial filed by defend-

ant, that it had erred in giving a certain instruction, which instruction should not have been given in view of certain facts shown in the trial. In other words, the court had instructed the jury that in the absence of evidence that the deceased did not look and listen for an approaching car, then the jury were at liberty to presume that he did look and listen. A witness for plaintiff, and the only eye-witness, had testified in effect that he saw deceased leave the sidewalk and go on across to the railroad track, paying no attention to the approaching car. Judge Lamm's remarks were induced by this state of affairs. The question before the trial court, and upon which the judicial discretion was exercised, was a mixed question of law and fact. The trial court concluded that in view of the facts testified to by this witness there was positive testimony that deceased did not look or listen before going upon the railroad track, and therefore there was no place for an instruction upon the ground of presumption. So that in this case the discretion was really exercised as to the facts of the case. Both of those cases announce the proper rule in cases where judicial discretion has been exercised as to the facts and the weighing of the evidence as to the facts. In such cases we will not disturb such discretion in a case wherein there is sufficient evidence to sustain a verdict in favor of the party for whom such discretion has been exercised. But these cases are not this case. Upon the facts of the case at bar a verdict for either party could be sustained, but the discretion of the trial judge was not directed to the facts, so far as the question now before us is concerned. He was passing judgment upon a clear question of law, and we have concluded that his judgment on that question was erroneous. When the judicial act is directed solely to a question of law and the act is erroneous, it does not fall within the rule of the exercise of sound judicial discretion. There is no discretion as to the law of a case. Nor can there be an exercise of a sound discretion as to the law of a case. So that when we speak of the granting of a new trial being within the sound discretion of the trial judge, we have no reference to a case where the new trial is granted solely upon the ground that the law has been erroneously given, when in fact it has been properly given.

* * * * *

YORK V. STILES.

Supreme Court of Rhode Island. 1899.

21 Rhode Island, 225.

ASSUMPSIT ON BOOK ACCOUNT. The facts are fully stated in the opinion. Heard on petition of defendant for a new trial. New trial denied.

TILLINGHAST, J. We think the ancient maxium "*de minimis non curat lex*" may well be applied to this case. The amount involved is only four dollars. The action was commenced in the District Court, where upon trial a decision was rendered for the defendant. It was then certified to the Common Pleas Division upon plaintiff's claim for a jury trial. When the case came on for trial the defendant did not appear, and a default was entered, and subsequently the court assessed the plaintiff's damages at the sum aforesaid. The case is now before us on the defendant's petition for a new trial, on the ground that the Common Pleas Division erred in certain rulings regarding the admission of evidence in connection with the assessment of damages on default. We think the petition should be denied. The amount involved is too trifling to warrant the court in sending the case back for another trial. Moreover, whatever the result of a new trial might be, if one should be had, it is manifest that it would be to the detriment of both parties to have one. And as remarked by Ames C. J. in *Spooner v. Leland*, 5 R. I. 352, in speaking of new trials; "Neither courts of law or equity when exercising, as in such cases, a discretion. exercise it except to some good and useful end." No vital question of principle is involved. The only dispute in the case is as to whether the defendant had the right to deduct from the plaintiff's wages, which were seven dollars per week, certain damages alleged to have been caused by her in running the "extractor" in the defendant's laundry. Such a dispute about such an insignificant matter does not strongly appeal to the judicial discretion of the court.

In *Buddington v. Knowles*, 30 Conn. 26, which was a pe-

tition for new trial on the ground that the damages, which the jury had assessed at \$66, were excessive, Ellsworth, J., in delivering the opinion of the court said: "It is a sufficient objection to granting a new trial for excessive damages, that the verdict is only for \$66, an amount too trivial to warrant the renewal of the controversy, unless courts of justice are kept open to gratify the evil passions of mankind. To grant the defendant's request will be to punish the defendant himself, were it certain that the damages would be reduced on another trial, which, however, it is not, either as a matter of law on the evidence before us, or as a matter of fact. Such a practice we cannot encourage, and we take this opportunity to say that a new trial in such cases should not be asked for, unless the case be one which involves something more than a trifling sum of money."

In *Hyatt v. Wood*, 3 Johns, 237, the court said: "It has frequently been decided in this court, that in cases where the damages are trifling, a new trial will not be granted after a verdict for the defendant, merely to give the plaintiff an opportunity to recover nominal damages, and when no end of justice is to be attained by it, though there may have been a misdirection of the judge. The principle stated by the judge in this case was incorrect, but the action is of too little importance to grant a new trial merely for that reason." See also to the same general effect, *Macrow v. Hull*, 1 Burr. 11; *Burton v. Thompson*, 2 Burr. 664; *Fleming v. Gilbert*, 3 Johns, 520; Hill. N. Tr. 2 ed. 483-4; *Roberts v. Karr*, 1 Taunt. 493.

A motion for a new trial is practically an appeal to the sound discretion of the court to prevent a material and palpable wrong. And it is never to be granted if the court can see that substantial justice has been done, notwithstanding irregularities may have occurred. Nor is it to be granted when the failure of justice has not been palpable; nor where the wrong done, however palpable it may be, is trivial in extent. 16 Am. & Eng. Ency. L. 503. The maxium above quoted, however, is not to be applied in case of the positive and wrongful invasion of another's property or personal rights. *Seneca Road Co. v. Railroad Co.*, 5 Hill, 170.

Petition for new trial denied, and case remitted to the

Common Pleas Division with direction to enter judgment on the decision.

NORTH CENTER CREEK MINING & SMELTING
COMPANY V. EAKINS.

Supreme Court of Kansas. 1880.

23 Kansas, 317.

The opinion of the court was delivered by

BREWER, J.: This was an action appealed from a justice of the peace, for labor done in and about certain zinc smelting works. The question was as to the liability of the defendant, no question being made as to the fact of the work or its value. The verdict was against the defendant. Upon a motion for a new trial, the court ruled that it should be granted, upon the payment within thirty days of all costs in the district court, and in default of such payment, that it should be overruled, and judgment entered on the verdict. The defendant alleges error.

The grounds of the motion for a new trial were, that the verdict was contrary to the law and the evidence, that the court erred in admitting testimony, and in other rulings. No claim was made on account of accident, surprise, or newly-discovered evidence. The claim of the defendant therefore was, that there was error on the part of the court or jury to its prejudice. The court, by sustaining the motion, even conditionally, in effect found that such claim was correct; and yet it refused any relief to defendant, except upon payment of costs. Now when the claim for a new trial is based upon accident, or newly-discovered testimony, grounds which concede the correctness of the trial already had, there is often fairness and justice in requiring a payment of the costs of such trial as a condition of a new one. For if the victorious party is without fault and the proceedings without error, it is a hardship on him to be compelled to relinquish what he has obtained and venture upon a new trial, simply on account of the intervention of some new fact in behalf of his op-

ponent. It is often just to make the party who has thus obtained an opportunity to relitigate his case, pay the fruitlessly expended costs of the first trial. But a different rule prevails where the new trial is claimed and awarded, not on account of the intervention of some new fact, but because of wrong conduct on the part of the successful party, or because the court or jury has at his instance and upon his solicitation committed error. In such case, if the error is a material one, the moving party has a clear, legal right to a second trial. He is the party without fault, and his adversary the wrongdoer; and the new trial should as a rule go without costs. We are aware of the statute which provides that the "costs of motions and the like shall be taxed and paid as the court in its discretion may direct." (Comp. Laws 1879, p. 682, § 588.) We also know that often in trials both parties are in fact in some fault and the motions for new trials cover all grounds, so that it is not always possible to determine upon what grounds the motion is sustained. But what we have suggested is, as to the rules which should control the discretion of the court in the matter of costs upon motions for new trials. Now as we have stated, the ruling of the court was an expression of its opinion that there had been error prejudicial to the rights of defendant, an opinion with which, after examining the record, we fully concur. The essential facts are, that a tripartite written agreement was entered into between L. D. Boone, the owner of certain zinc works, the defendant, and Louis Vogle, and Louis Goes, doing business under the name of the Consolidated Zinc Mining & Smelting Company, by the terms of which Boone was to put his works in repair and lease them. The defendant was to furnish zinc ore for smelting and the C. Z. M. & S. Co. were to hire all needed employes and run the works, smelting the ore furnished by the defendant, and after paying one stipulated portion of the product to Boone for the rent of the works and another stipulated portion to the defendant for ore, take the balance for its compensation. Evidently from the terms of this agreement, no partnership was contemplated between these parties, but simply an arrangement for the rent of buildings and machinery and the reduction of ore to mineral. So the court instructed the jury, and the instruc-

tion was correct. The court also correctly instructed as to the circumstances under which one not in fact a partner might become liable as partner to third parties by reason of his conduct in respect to the partnership affairs, and charged that if the plaintiff did not at the time of doing the work understand that defendant was a partner or responsible for the work, he could not hold the defendant unless it was in fact a partner. Turning now to the testimony, we find the plaintiff, after testifying that he hired to the Consolidated Zinc Mining & Smelting Company, stating, "I did not know at the time I hired with Mr. Vogle that he was in partnership with the North Center Creek Mining & Smelting Company, nor did I know it at the time I brought this action." Indeed, the defendant was not a party at the commencement of the action, but made one subsequently by amendment. As the defendant was not in fact a partner and as the plaintiff did not suppose it was a partner, it is difficult to see upon what ground a recovery against it can be sustained. The court was right in ruling that it was entitled to a new trial, and the error was in making the payment of costs a condition precedent. It should have been granted without condition. Without fault on its part the defendant had been brought into court and compelled to litigate an unjust demand, and should not have been required to pay any costs the plaintiff had made as a condition of protection in its defense.

The judgment in the district court will be reversed, and the case remanded with instructions to grant a new trial.

All the Justices concurring.

BROOKS V. SAN FRANCISCO & NORTH PACIFIC RAILWAY COMPANY.

Supreme Court of California. 1895.

110 California, 173.

SEARLS, C.—This was an action to recover damages sustained by the infant plaintiff for personal injuries received

while a passenger upon the railway train of the corporation defendant.

The cause was tried before a jury and a verdict rendered in favor of plaintiff for five thousand dollars. Judgment was entered thereon February 26, 1894.

Defendant in due time moved for a new trial, which was granted "upon the payment by defendant to plaintiff of the sum of three hundred dollars for counsel fees and expenses necessarily incurred in said motion." This order was made June 25, 1894.

On July 23, 1894, defendant gave notice of an appeal to this court from the order of the court below granting a new trial upon the condition specified in the order, and, on the same day, gave notice of an appeal from final judgment entered in the cause February 26, 1894.

* * * * *

That a *nisi prius* court has the power to impose terms as a condition of making an order for a new trial is too well settled to need argument in its support.

In *Rice v. Gashirie*, 13 Cal. 54, which in view of the fact that the motion was founded upon errors of law occurring at the trial, and hence at first blush would seem not to have been a case involving turpitude on the part of the losing party, the court below granted a new trial upon condition that the moving party should pay the costs.

Upon an appeal by the moving party this court, speaking through Baldwin, J., said: "The terms upon which a court will grant a new trial are peculiarly a matter within its discretion. This must necessarily be so, for so many reasons relating to the conduct, management, and peculiar circumstances of the trial may exist that it would be impossible to prescribe any general rules on the subject. If error at law intervenes, a party may take his exceptions and prosecute his appeal without motion for a new trial; but if he makes his motion and relies upon that for redress against an improper verdict, he must subject himself to the equitable power of the court.

"The verdict may have gone against him in some degree or wholly, by his own neglect or default, or even the rulings of law be chargeable to his own laches or want of diligence. In such cases it may be proper to grant him a new trial, yet only upon equitable terms. We cannot interfere with

this exercise of discretion unless upon a clear showing that it has been abused, or that the terms were grossly unreasonable."

In the present case the motion for a new trial was based, among others, upon the ground of the "insufficiency of the evidence to justify the verdict."

This is a ground appealing peculiarly to the discretion of the trial court. And wherever the conditions are such that the court below is authorized in its discretion to impose terms as a condition to granting a new trial, this court will interfere only in those cases where it manifestly appears that there has been an abuse of such discretion.

The following cases in this court recognize and uphold the right of the trial court in one form and another to impose terms and conditions in granting and refusing motions for new trials: *Sherman v. Mitchell*, 46 Cal. 578; *Gillespie v. Jones*, 47 Cal. 264; *Chapin v. Bourne*, 8 Cal. 294; *Harrison v. Peabody*, 34 Cal. 178; *Dreyfous v. Adams*, 48 Cal. 131; *Benedict v. Cozzens*, 4 Cal. 381; *Corber v. Morse*, 57 Cal. 301; *Gregg v. San Francisco etc., Ry. Co.*, 59 Cal. 312; *Davis v. Southern Pac. Co.*, 98 Cal. 13.

In the case last cited the jury had found a verdict in favor of plaintiff for fifteen thousand three hundred dollars. Defendant moved for a new trial.

The trial court made an order that, if plaintiff should consent that the judgment be reduced to nine thousand dollars, the new trial would be denied, and that otherwise it would be granted. Plaintiff consented to the reduction, and the motion was thereupon denied. Defendant appealed from the order.

Counsel for appellant attacked the power of the court to make such an order, and contended that if the court thought the verdict excessive its duty was to grant a new trial.

This court, speaking through McFarland, J., after admitting that the position of appellant was a strong one, added: "But whatever might be considered the weight of reason and foreign authority on the question above stated, if it were *res integra* here, the right of a court to do what is complained of in the case at bar is too firmly es-

tablished in this state by a long line of decisions to be now questioned."

The principle involved in that case is the same as that underlying the present one, and goes to the power of the court to impose terms in granting and refusing motions for new trials.

A review of the record fails to disclose any basis for concluding that there was an abuse of discretion in imposing terms as a condition to granting the motion for a new trial. It follows that the order appealed from by defendant should be upheld.

* * * * *

COHEN V. KRULEWITCH.

*Appellate Division of the Supreme Court of
New York. 1902.*

77 Appellate Division, 126.

INGRAHAM, J.:

The action was brought to recover commissions for procuring a purchaser of certain property belonging to the defendant. The plaintiff testified that he was employed by the defendant to procure a purchaser of this property; that he procured a purchaser therefor upon terms satisfactory to the defendant; that the defendant subsequently refused to complete the purchase and thereby the plaintiff became entitled to his commissions. The defendant denied the employment; denied that the plaintiff ever procured a purchaser of the property, or that he ever promised to pay him any commissions. The case was submitted to the jury who found a verdict for the plaintiff, whereupon the court, on motion, set aside the verdict and ordered a new trial upon the ground that there was no evidence that the purchaser was ever ready to sign the contract to purchase the defendant's property and no evidence that the contract between the defendant and the purchaser was ever in fact prepared, and, therefore, no evidence that the plaintiff had done what he contracted to do—obtain a

person who was ready and willing to make an exchange with the defendant for the property that was satisfactory to the defendant, and also upon the ground that the weight of evidence was against the plaintiff, and as the plaintiff had the burden of proof the jury should have found for the defendant in the case and not for the plaintiff.

We think the court was entirely justified in setting aside the verdict for the reason assigned by the trial judge, and that the jury were not justified upon the evidence in finding a verdict for the plaintiff. The plaintiff insists, however, that the court should have imposed costs upon the defendant as a condition for granting the motion to set aside the verdict. Where a motion is made to set aside a verdict upon the ground that the plaintiff has failed to prove his case, there is no rule that requires that costs should be imposed as a condition for granting a new trial. In such a case a new trial is not granted as a matter of discretion, but as a matter of right, and we do not think the court would then be justified in imposing costs as a condition for granting a new trial. While it is proper for the court to impose costs upon granting a new trial where there was a proper case for the submission of the question to the jury, but where for some reason the court is satisfied that the verdict was not a fair determination of the question submitted to them or that justice requires that the case should be submitted to another jury, this is not such a case. Upon this record we think the court below was required to grant a new trial without the imposition of any costs upon the defendant.

It follows that the order appealed from should be affirmed, with costs.

VAN BRUNT, P. J., O'BRIEN and McLAUGHLIN, JJ., concurred; HATCH, J., dissented.

Order affirmed, with costs.

STAUFFER V. READING.

*Supreme Court of Pennsylvania. 1903.**206 Pennsylvania State, 479.*

Appeal from jury of view. Before ENDLICH, J.

From the record it appeared that the city of Reading appropriated one and one-half acres of plaintiff's land for the purpose of a boulevard. The boulevard was so located as to cut off three acres of plaintiff's land to the north, leaving about seven acres to the south of the boulevard.

Verdict for plaintiff for \$3,295.83.

On a rule for a new trial the court made the following order:

November 10, 1902. The rule to show cause is discharged, on condition that the plaintiff within thirty days from the date of entry of this order convey to the defendant, for park purposes, the tract lying north of the boulevard; otherwise, upon the expiration of said period, the rule to become absolute.

Plaintiff appealed.

* * * * *

Opinion by MR. JUSTICE MITCHELL, July 9, 1903:

The granting or refusing of a new trial except for causes like errors of law by the judge or misconduct of the jury, where it may be matter of right, is an exercise of judicial discretion by the court in furtherance of right and justice according to the circumstances of the case. Hence it is well settled that the court may impose terms upon either or both of the parties as conditions of the grant or refusal, and the latitude allowed to the discretion of the court to this end is very great. As each case must be determined on its own circumstances the causes cannot all be specified or enumerated before hand, but in general as is said by the most prominent writer on the subject, "it may be safely asserted that no case can occur presenting circumstances timely addressed to the discretion of the court, in which the rights of the parties may not be fully protected by the

imposition of conditions meeting the exigency:" Graham on New Trials, 610.

Large as the discretion is, however, it is a judicial discretion and must be used with reference to the rights involved in the controversy. The conditions imposed therefore must have some direct relation to the issue between the parties in the case.

The condition complained of in the present proceeding transgresses this limit. The conveyance of the three acres was not asked for by the city nor offered by the appellant. Whatever its merits as a just or wise settlement between the parties, it was not apparently desired by either, and was certainly no part of the issue which they brought into court to have decided. In imposing it as a condition of the refusal of a new trial therefore, the court exceeded its discretionary authority.

The condition was erroneous also from another point of view as tending to deprive appellant of his property in violation of his right to have a jury pass upon its value. In this respect the case goes further than *Lehr v. Brodbeck*, 192 Pa. 535, where the jury having found a verdict for defendant contrary to the instructions of the judge, as to part of the goods sued for, the court directed the acceptance of an offer by the defendant to pay a sum less than plaintiff claimed, and on refusal of plaintiff to accept, refused a new trial. It was held that this was error. In the opinion our Brother Dean said: "The plaintiff claimed that the value of her goods wrongfully seized and sold was \$335. And whether this was the value or not, she had offered evidence tending to establish it as the value. As a suitor under the law she had a right to the opinion of the jury on the evidence; and the court at the trial thought so too. It however now directs her arbitrarily to strike from her claim \$85.00 and as a penalty for refusal in effect says she shall have nothing." See also *Bradwell v. Pittsburg, etc., Ry. Co.*, 139 Pa. 404.

Judgment reversed, and record remitted with directions to reinstate the rule for new trial and proceed to dispose of it according to law.

GILA VALLEY, GLOBE & NORTHERN RAILWAY
COMPANY V. HALL.*Supreme Court of the Territory of Arizona. 1911.**13 Arizona, 270.*

CAMPBELL, J. Appellee was in the employ of appellant as chainman. On April 23, 1907, he was engaged with another employee, named Ryan, in measuring distances, locating mile-posts on appellant's line of railway. For that purpose they used a three-wheeled velocipede furnished by appellant. This velocipede was of the kind ordinarily used in work of this character, with a gasoline engine for motive power. It had two wheels on the right-hand side, over which was the engine, and a seat for the use of the operator, and a seat in front for another person. The third wheel was a small wheel on the left-hand side, nearly opposite the front wheel on the right-hand side, and fastened to the machine by a bar extending across the track. On the day mentioned, Hall and Ryan were upon this velocipede on plaintiff's line of railway, Ryan operating the machine and Hall sitting in front. While the velocipede was going at a speed of from eight to twelve miles an hour, it suddenly left the track, going to the left, the side on which was situated the one small wheel. Hall was thrown in front of it and run over, sustaining severe injuries. This action was brought against the railroad company to recover damages for the injuries so received, it being alleged that the flange on the third or small wheel was worn and cracked, and that by reason of such condition the machine left the track, and that the company was negligent in furnishing such velocipede. Appellant answered, denying the negligence alleged, pleading contributory negligence, and that Hall knew or might have known the condition of the velocipede and assumed the risk of the injuries resulting from the alleged defect. The jury returned a verdict for \$10,000. A motion for a new trial was made, and prior to its determination Hall voluntarily remitted \$5,000 from the amount of the verdict. Thereafter, the court denied the motion for a new trial

and entered judgment in favor of the plaintiff for \$5,000 and costs. From this judgment and from the order denying the motion for new trial, the railway company appeals.

* * * * *

The remaining important question in the case is whether the court erred in rendering judgment for the amount of the verdict less the sum remitted by the appellee. It is insisted by appellant that the court should have granted a new trial for the reason that it is beyond the power of a court to permit a *remittitur* where the damages are unliquidated and the verdict excessive. The question has heretofore been before this court in two cases. *Southern Pacific Co. v. Tomlinson*, 4 Ariz. 126, 33 Pac. 710, was an action to recover damages for death by wrongful act, under a statute permitting the jury "to give such damages as they may think proportioned to the injuries resulting from said death." A verdict for \$50,000 was returned, from the which the plaintiff remitted \$31,998, and judgment was entered for the remainder. The power of the trial court to permit the *remittitur* was questioned, but it was held: "A trial court has the power, where excessive damages have been allowed by the jury, and where the motion to set aside the verdict is based upon this ground, to make a remission a condition precedent to overruling the motion. The exercise of this power rests in the sound discretion of the court. This doctrine is affirmed in the case of *Cattle Co. v. Mann*, 130 U. S. 74, 9 Sup. Ct. 458, 32 L. Ed. 854; also in *Railroad Co. v. Herbert*, 116 U. S. 642, 6 Sup. Ct. 590, 29 L. Ed. 755. Of course, if it is apparent to the trial court that the verdict was the result of passion or prejudice, a *remittitur* should not be allowed, but the verdict should be set aside. In passing upon this question, the court should not look alone to the amount of damages awarded, but to the whole case, to determine the existence of passion or prejudice, and to determine how far such passion or prejudice may have operated in influencing the finding of any verdict against the defendant. When the circumstances, as they may appear to the trial court, indicate that the jury deliberately disregarded the instructions of the court, or the facts of the case, a *remittitur* should not be allowed, but a new trial should be granted. If they do not so indicate, and the plaintiff vol

untarily remits so much of the damages as may appear to be excessive, the court, in its discretion, may allow the remission and enter judgment accordingly." In *Southern Pacific Co. v. Fitchett*, 9 Ariz. 128, 80 Pac. 359, the verdict was for \$1,000 for "injuries to feelings," from which the plaintiff, upon the suggestion of the trial court, remitted \$600. This court held that it was apparent that the jury was influenced by passion or prejudice, and that therefore a new trial should have been granted. We further sought to distinguish the facts in that case from the *Tomlinson* case, suggesting that in the latter the damages were susceptible of accurate computation from the evidence. We are not now prepared to adhere to the views so expressed. Both are cases of unliquidated damages. In the one case not less than the other, the jury's verdict represents the damages "proportioned to the injuries resulting" in the opinion of the jury, based upon evidence that affords no basis for exact computation. If there is a difference, it is one of degree rather than one of kind. There is authority for the position that in no case of unliquidated damages should the court permit a remission where the verdict is excessive, without the consent of the defendant, but as we now view it, the great weight of authority supports the practice. *Northern Pacific R. R. Co. v. Herbert*, 116 U. S. 642, 6 Sup. Ct. 590, 29 L. Ed. 755; *Arkansas Cattle Co. v. Mann*, 130 U. S. 69, 9 Sup. Ct. 458, 32 L. Ed. 854; *Kennon v. Gilmer*, 131 U. S. 22, 9 Sup. Ct. 696, 33 L. Ed. 110; 29 Cyc. 1022, 1023, and cases cited.

It is argued that to permit a *remittitur*, or to require it as a condition of refusing a new trial, is to substitute the court's judgment for that of a jury, to the latter of which the defendant is entitled. But it is to the jury's judgment that defendants object when they appeal to the court for new trials on the ground of excessive verdicts. The trial court has undoubted power to determine whether the verdict is or is not excessive, and in considering the question usually determines in its own mind the maximum amount for which a verdict could with propriety be permitted to stand. Where there has been no error of law committed which would require a re-trial, and it appears that the excessive verdict has resulted from too liberal views as to the damages sustained, rather than from

prejudice or passion, to permit a remission of the excess, instead of putting the parties to the expense of a new trial, promotes justice and puts an end to the litigation. Of course, if it appears that the verdict is tainted by prejudice or passion, and does not represent the dispassionate judgment of the jury upon the question of the right of the plaintiff to recover, a new trial should be granted. But we think that the trial court is in a better position to determine whether the verdict is so tainted than is this court, and that unless it clearly appears from the record that the excessive verdict resulted from prejudice or passion, rather than from that liberality which jurors sometimes exercise in cases which appeal to men's sympathies, we should accept the trial court's determination. The trial court in this case has determined that the jury was not influenced by passion or prejudice, and we see no reason for not accepting its conclusion.

Other rulings of the court are assigned as error and have received our consideration, but they are not of sufficient importance to warrant discussion here. We find no reversible error in the record, and affirm the judgment of the district court.

KENT, C. J., and LEWIS and DOE, JJ., concur.

SECTION 11. NOTICE OF MOTION.

HANSEN V. FISH.

Supreme Court of Wisconsin. 1871.

27 Wisconsin, 535.

LYON, J. * * *

The action was tried at the December term, 1869, of that court, and the plaintiff had a verdict. The verdict was returned on the 15th day of that month, and immediately the attorney for the defendants, in the absence of the attorney for the plaintiff, made a motion orally for a new trial upon the minutes of the judge. This motion was not entered in the minutes of the clerk at the time it was made. On

the return of the attorney for the plaintiff into court soon after, the judge informed him that such motion had been made. However, the attorney for the plaintiff, understanding that the motion was not to be entertained, remitted a part of the verdict, and procured the judge to sign an order for judgment for the residue thereof. The judge did not understand that such motion was not to be pressed or entertained, and signed the order for judgment inadvertently. The counsel for plaintiff proceeded to give notice of the adjustment of the costs, had the same adjusted, and, on the 22d day of December, perfected the judgment and left the court. On the next day, December 23d, the court, in the due course of business, heard the motion for a new trial made on the 15th, no one appearing thereon for the plaintiff, and after due consideration and on the same day granted the motion.

At the next term of the court the plaintiff moved the court, on due notice, to set aside and vacate the order of December 23d, granting a new trial; and the court denied the motion, and an order was duly entered to that effect. From this last mentioned order the plaintiff appeals.

The principal question presented by this appeal is, whether the opposite party is entitled to formal notice of a motion made upon the minutes of the judge to set aside a verdict, or a verdict and judgment, if judgment has been entered, and for a new trial.

Such motions must be made at the same term at which the cause is tried. R. S. ch. 132, sec. 16. "A trial is the judicial examination of the issues between the parties, whether they be issues of law or of fact." Sec. 5 of the same chap. This judicial examination of the issues is not by the jury alone. The judge has something to do with it. Hence such examination is not complete when the jury have returned a verdict.

It is then for the judge to say whether they have decided correctly, and if he finds upon "an examination of the issues" that they have not, or if he finds that his rulings during the trial have been wrong, on a motion for that purpose founded on his minutes, and made at the same term, he will set aside such erroneous verdict and grant a new trial.

It seems quite clear to my mind, that such motion and the decision thereof is a part of the trial, and is covered by

the notice of trial. This is so of all the usual motions which may be made in progress of a trial intermediate the verdict and the judgment, such as motions for stay of proceedings after verdict and motions for judgment, which may involve to some extent an examination of the issues. I do not understand that there is any law or rule of court which requires notice to be given of such motions when they are made at the same term at which the cause is tried. And I think a motion for a new trial on the minutes of the judge is of the same character. In practice I never knew a formal written notice of such motion to be given. They are usually made orally, decided by the court, and the motion and order granting or denying it entered in the minutes by the clerk. In the ninth circuit it is not the practice to hear argument upon such motions, except in special cases the judge indicates a desire that they be argued. So far as I know, this practice prevails to a greater or less extent throughout the state, and I think has its origin in the generally received opinion of the courts and the bar, that these motions and the decision of them are parts of the trial, and do not require any formal notice to the adverse party, but are covered by the notice of trial. * * *

We find no error in the proceedings of the circuit court, and are therefore of the opinion that the order appealed from should be affirmed.

By the Court.—Order affirmed.

BOARMAN V. HINCKLEY.

Supreme Court of Washington. 1897.

17 Washington, 126.

The opinion of the court was delivered by

REAVIS, J.—Action by plaintiff, respondent here, against defendant for damages for breach of contract. Verdict of jury for defendant. Within two days after rendition of the verdict the plaintiff filed and served on the defendant a motion for a new trial, specifying the grounds relied upon in the motion. The court, upon hearing the motion,

granted a new trial, from which order the defendant appeals.

The first contention of appellant is that no notice of intention to move for a new trial was filed within two days after rendition of the verdict, as required by the statute (Code, Proc., § 404), but the motion itself specifying the grounds assigned for a new trial was filed and served on the defendant within the time required by statute. The cases cited by appellant from California and Montana are inapplicable. In those cases, either no notice or motion was filed within the time required by statute, or else the specifications of the reasons relied on for asking a new trial were not stated. The courts usually construe the form of a notice fairly. The motion for a new trial filed by plaintiff in this case fully advised the defendant of plaintiff's intention to move for a new trial, and specified the grounds. The motion itself here fulfills the function of the notice required by the statute. The power to grant a new trial by the court hearing the cause is one of discretion, and the statute making the order appealable has not changed the established principles controlling the granting or refusal of a new trial. Only abuse of such discretion will be reviewed. We perceive no abuse of its discretion by the superior court in the order made, and its order is affirmed.

SCOTT, C. J., and ANDERS, DUNBAR and GORDON, JJ., concur.

ANDERSON V. FIRST NATIONAL BANK OF GRAND FORKS.

Supreme Court of North Dakota. 1895.

5 North Dakota, 80.

CORLISS, J. * * *

* * * * *

It was urged on the argument that the order denying the motion for a new trial should be affirmed, for the reason that it appears that the notice of intention to move for

a new trial was not served within the statutory time. But an examination of the record satisfies us that the time in which to serve such motion was extended by the court, and that the notice was served within the time as so extended. Nor do we think there is any force in the contention that the paper so served was not a notice of intention. It is true that it was in bad form, in that it embodied a notice, not only that plaintiff intended to move for a new trial on the grounds therein stated on a statement of the case, but that he would bring his motion for such new trial on to a hearing at a specified time and place. The notice of intention and the notice of motion are two distinct and utterly different notices, and it is not good practice to embrace both elements in one paper. Sections 5090, 5092, Comp. Laws. The notice of intention should not state when and where the motion for a new trial will be heard. As a general rule, the person who desires to make such motion is not in position to notice his motion for a hearing at the time he serves his notice of intention, for it often happens that at that time the bill or statement has not been settled.

The order is reversed, and a new trial is granted. All concur.

KRAKOWER V. DAVIS.

Supreme Court of New York, Appellate Term. 1897.

20 Miscellaneous, 350.

BISCHOFF, J. The plaintiff's claim was for commissions earned in a transaction involving the sale of certain real estate, owned by the defendants as tenants in common, and the trial resulted in a verdict in his favor "for one-eighth of the commission claimed."

This verdict was set aside, at the time of its rendition, and a new trial was ordered, from which order the defendant Levy, the sole litigating defendant, appeals.

* * * * *

The first objection which the appellant raises to the va-

lidity of the order is based upon the fact that no notice of the motion was given, the order having been made directly upon the rendition of the verdict.

The statute provides (Laws 1896, chap. 748): "Notice of such motion of not less than five days nor more than eight days shall be given to the adverse party or his attorney, within five days after the rendition of the verdict, or the entry of the judgment," and it is contended that the justice was without power to make the order in question because such notice had not been given.

This statutory requirement of notice was for the adverse party's benefit only, and so could be waived by him (*Re Cooper*, 93 N. Y. 507), and his consent to the court's entertaining the motion at the time when it was made, in his presence, was to be inferred from his failure to object upon the ground that insufficient notice had been given (*Mayor, etc. v. Lyons*, 24 How. Pr. 280), if, indeed, the statute is to be construed as calling for such notice where the motion is made upon the return of the verdict.

* * * * *

Order affirmed, with costs.

DALY, P. J., and McADAM, J., concur.

Order affirmed, with costs.

SIMPSON V. BUDD.

Supreme Court of California. 1891.

27 Pacific, 758.

DE HAVEN, J. * * *

* * * The only question for decision is whether the statutory time for giving notice of intention to move for a new trial and the preparation of bills of exception can be extended by a stipulation of counsel not filed within the statutory time, and of this we entertain no doubt. An attorney has authority to bind his client in any of the steps of an action or proceeding by his agreement in writing, filed with the clerk, or entered upon the minutes of the court. Section 283, Code Civil Proc. The service and filing of

notices of motion for a new trial and proposed bills of exception are steps in an action within the meaning of this section, and the stipulation is filed in time if it is on file, with the consent of the adverse attorney, when the court is called upon to act upon the matter affected by the stipulation. Section 1054 of the Code of Civil Procedure does not limit the authority of attorneys, as given by section 283 of the same Code, nor prescribe the exclusive mode by which the time for giving notices or the service of proposed statements or bills of exception may be extended, but it only imposes a limitation upon the power of the court to extend such time without the consent of the adverse party. It is undoubtedly true, as has often been decided by this court, that the right to move for a new trial is statutory, and, unless the prescribed steps are taken within the time allowed, the right does not exist as against a party who stands upon the statute and insists upon strict compliance with every provision of the law relating thereto, and intended for his benefit; but it has never been held that such provisions may not be waived by the party otherwise entitled to claim their benefit. On the contrary, it has been assumed in many cases, if not directly decided, that the time for giving notice of motion for a new trial, as well as every other step to be taken in relation thereto, may be waived or extended by consent. *Hobbs v. Duff*, 43 Cal. 485; *Brichman v. Ross*, 67 Cal. 602, 8 Pac. Rep. 316; *Patrick v. Morse*, 64 Cal. 462, 2 Pac. Rep. 49; *Gray v. Nunan*, 63 Cal. 220; *Schieffery v. Tapia*, 68 Cal. 184, 8 Pac. Rep. 878; *Curtis v. Superior Court*, 70 Cal. 390, 11 Pac. Rep. 652. We are of the opinion that the parties may, within the time allowed by law to give notice of intention to move for a new trial, stipulate that the time for giving such notice may be extended, and that such stipulation has effect without any order of the court ratifying the same. The question in such cases is one which most immediately concerns the parties to the action, and attorneys may be safely intrusted to look after the rights of their respective clients in such matters. * * *

We concur: BEATTY, C. J.; SHARPSTEIN, J.; HARRISON, J.; PATTERSON, J.; GAROUTTE, J.

SECTION 12. TIME OF MOTION.

CITY OF ST. JOSEPH V. ROBISON.

*Supreme Court of Missouri. 1894.**125 Missouri, 1.*

BURGESS, J.

This is ejectment for the recovery of the possession of a small parcel of ground which plaintiff claims as a part of a street, and to which defendant claims to have acquired title by limitation. There was a trial to a jury and judgment rendered for defendant, and plaintiff appeals.

The verdict was rendered on the sixth day of November, 1891, and the motion for a new trial was filed on the sixteenth day of November next thereafter. The motion was filed out of time, and the bill of exceptions can not be considered by this court. It should have been filed within four days after the verdict (R. S. 1889, sec. 2243), and could not be filed thereafter. It was so held in *Maloney v. Railroad*, 122 Mo. 106. The judgment is affirmed. All of this division concur.¹

¹ This was the common law rule. Tidd says: "The motion for a new trial must be made, in the King's Bench, within *four days exclusive* after the entry of a rule for judgment (Doug. 171); and it cannot be made after the *four days*, though by consent of the parties (1 Clut. 382, 3)" 2 Tidd's Practice, *912. In the United States the time is usually fixed by statute or rule of court. When not so fixed it is a matter within the discretion of the court. Thus, it was said in *Conklin v. Hinds* (1871) 16 Minn. 457: "At common law and in the chancery, the time for making it [the motion for a new trial] was matter of practice regulated by rule of court. It remains so unless the statute has regulated the practice. And since it has not done so in this instance, and the district court has adopted no general rule in this respect, it must be for the judge, before whom such motion is made, to decide in each instance, whether or not it was made too late, a decision which we should not review, unless an abuse of discretion appeared."

BAILEY V. DRAKE.

*Supreme Court of Washington. 1895.**12 Washington, 99.*

HOYT, C. J.

This is an appeal from an order granting a new trial. The verdict which was set aside by said order was rendered on the 1st day of December. The motion for a new trial was not filed until the 4th day of December. On account of the delay in its filing the appellant objected to its being heard. Upon such objection being made the court, on motion of the respondent, made an order extending the time in which the motion for a new trial might be filed so as to include the said 4th day of December, and, having done so, proceeded to the consideration of the motion and, for reasons satisfactory to it, set aside the verdict and ordered a new trial.

Appellant relies upon two grounds to reverse the order: (1) That it was beyond the power of the court to extend the time in which to file the motion for a new trial after the expiration of the time fixed by the statute. * * *

The appellant cites numerous cases to support his first contention, but none of them have any force under our statute, which, unlike those of the states in which the decisions relied upon were rendered, specially confers the power upon the court to enlarge the time for the making of any motion or giving notice thereof, after the expiration of the statutory time as well as before. The language of sec. 24, of ch. 127 of the Laws of 1893 (p. 414), upon this subject is as follows:

“* * * And the court may enlarge or extend the time, for good cause shown, within which by statute any act is to be done, proceeding had or taken, notice of paper filed or served, or *may*, on such terms as are just, permit the same to be done or supplied *after the time therefor has expired.*
* * * * *

And there can be no escape from the conclusion that the legislature intended by its enactment to confer authority upon the courts to extend the time in which acts of the

kind under consideration could be done after the expiration of the statutory time, as well as before.

* * * * *

Affirmed.

SCOTT, DUNBAR, ANDERS and GORDON, JJ., concur.

HAYES V. IONIA CIRCUIT JUDGE.

Supreme Court of Michigan. 1900.

125 Michigan, 277.

Mandamus by Mary A. Hayes to compel Frank D. M. Davis, Circuit Judge of Ionia county, to strike a motion for a new trial from the files, and to vacate an order extending the time in which to settle a bill of exceptions or move for a new trial. Submitted October 30, 1900. Writ denied November 13, 1900.

MOORE, J.

* * * * *

The provisions of law in relation to new trials in civil causes are to be found in 1 Comp. Laws 1897, sec. 205, and Cir. Ct. Rule No. 21.¹ It will be observed that there is no such limitation of time as there is in the rule relating to the settlement of bills of exceptions. The provisions do not interfere with the common-law discretion of the court. They only fix a time beyond which no one could move for a new trial as a matter of right. In *People v. Wayne Circuit Judge*, 20 Mich. 220, it was said:

“It is not clear that motions for a new trial based on newly-discovered evidence would come within the rule fixing a time, for the facts may not be ascertained until afterwards. It is not desirable to compel parties to resort to courts of equity to obtain new trials, where it can be avoided; and in such cases the courts of law should act on equit-

¹ Circuit Court Rule 21 reads as follows: “Motions for a new trial and motions in arrest of judgment, with the reasons on which they are founded, shall be filed and a copy thereof served on the opposite party within five days after the rendition of a verdict, in the case of a trial by jury, and within a like time after the decision of the court, when the cause has been tried by the court, or within such further time as shall be allowed therefor by the court or judge.”

able principles, and do, if they can, what justice requires.”

See, also, *Van Renselaer v. Whiting*, 12 Mich. 449; *Campau v. Coates*, 17 Mich. 237.

In *Manufacturers' Mut. Fire Ins. Co. v. Gratiot Circuit Judge*, 79 Mich. 241 (44 N. W. 604), an *ex parte* order extending the time in which to move for a new trial was entered. This court declined to interfere with the action of the court. In the case of *Reynolds v. Sweet*, 104 Mich. 252 (62 N. W. 356), a judgment was entered in the circuit court March 21, 1894. The case was brought to this court, and decided February 26, 1895. The judgment of the court below was affirmed, and a remittitur was sent to the clerk of the circuit court. The judgment was paid in March. December 20th following, a year and nine months after the original judgment was entered, a motion was made for a new trial, and the new trial was granted. Upon an application for a *mandamus*, this court declined to interfere. *Reynolds v. Newaygo Circuit Judge*, 109 Mich. 403 (67 N. W. 529). In *Fort Wayne, etc., R. Co. v. Wayne Circuit Judge*, 110 Mich. 173 (68 N. W. 115), the circuit judge upon his own motion granted a new trial, and it was held he had the right to do so. The counsel for the relator cite the case of *Frazer v. Judge of Recorder's Court*, 112 Mich. 469 (70 N. W. 1042). That case was a criminal case. The statute authorizing a new trial in criminal cases limited the time in which the application must be made. The case is not applicable here.

It is urged that, if the circuit judge may grant a new trial after the time for settling a bill of exceptions has expired, unreasonable delays will be caused, abuses will arise, and parties will obtain by indirection what they cannot obtain directly. We are not at liberty to assume that circuit judges will not do their full duty, or will grant a new trial except where it ought to be granted in furtherance of justice. Should such a case arise, a proper disposition can be made of it.

The application for the writ is denied.

The other Justices concurred.

ROGGENCAMP V. DOBBS.

*Supreme Court of Nebraska. 1884.**15 Nebraska, 620.*

MAXWELL, J.

This is an action of replevin brought by the plaintiff against the defendant to recover certain hogs belonging to the plaintiff, which the defendant as pound master of the village of Bennett had taken up. On the trial of the cause, the jury found for the defendant, and that he had a special interest in the hogs in question for \$10.50. The verdict was rendered on the seventh of June, 1882, and judgment rendered thereon on the twelfth of that month. On the eighteenth, or six days after judgment was rendered, the plaintiff asked leave to file a motion for a new trial. This application was accompanied by affidavits setting forth neglect of the plaintiff's attorney to file the motion, and that the plaintiff placed reliance upon him, etc. A motion for a new trial was also tendered. The application was overruled, and there being no motion for a new trial a motion is now made to quash the bill of exceptions.

Unless equitable grounds exist for granting a new trial, as where a party is prevented from making his defense by circumstances beyond his control, in which case equity may in a proper case grant relief, a motion for a new trial must be filed within the time fixed by law. *Horn v. Queen*, 4 Neb. 108; *Leiby v. Heirs of Ludlow*, 4 Ohio, 493; *Vannerson v. Pendleton*, 8 S. & M. 452; *Peebles v. Ralls*, 1 Little, 24. Unless equitable grounds exist, such as will warrant a court of equity in granting relief, the motion for a new trial must be made at the term the verdict or decision is rendered, and, except for the cause of newly discovered evidence, shall be within three days after the verdict or decision is rendered, unless unavoidably prevented. Code, sec. 316. The words "unavoidably prevented" evidently refer to circumstances beyond the control of the party desiring to file the motion. The law requires diligence on the part of clients and attorneys, and the mere neglect of either will not entitle a party to relief on that ground. It

might be different in case of the deliberate betrayal of a client by an attorney. But such case probably will not occur, and is not shown in this. There being no sufficient cause shown for filing the motion for a new trial, there was no error in denying the same. As none of the errors assigned in the petition in error can be considered, the judgment of the court below must be affirmed.

Judgment accordingly.

The other judges concur.

HELLMAN V. ADLER & SONS CLOTHING
COMPANY.

Supreme Court of Nebraska. 1900.

60 Nebraska, 580.

SULLIVAN, J.

This proceeding in error has for its object the reversal of a judgment denying Maria Hellman's application for a new trial based upon an alleged discovery of material evidence after the adjournment of the term at which the case of *David Adler & Sons Clothing Co. v. Maria Hellman* was decided. The final decree in the case mentioned was rendered in February, 1895. It was adverse to the defendant, and she appealed to this court, where the decision of the district court was affirmed June 9, 1898. It appears from the record that the petition for a new trial was dismissed because it was not filed within the time limited by section 318 of the Code of Civil Procedure. It was filed October 27, 1898; more than three years after the final judgment was rendered in the district court, but within one year after the judgment of affirmance was pronounced. Counsel for the plaintiff in error contend that their application was seasonably made, because the final judgment contemplated by the limitation law is the ultimate decision rendered in the case, whether such decision be given by the trial court or by this court. We think counsel are wrong.

The policy of the legislature with respect to the re-examination of the issues of fact once tried and determined

is clearly indicated in article 6 of the Civil Code. A party claiming a new trial must show diligence; he must move promptly. Any needless delay, any inertness, on his part, which hinders the court in bringing the litigation to a speedy conclusion results in a forfeiture of the statutory right. Section 316 is as follows: "The application for a new trial must be made at the term the verdict, report or decision is rendered, and, except for the cause of newly discovered evidence material for the party applying, which he could not with reasonable diligence have discovered and produced at the trial, shall be within three days after the verdict or decision was rendered, unless unavoidably prevented." Section 318 provides: "Where the grounds for a new trial could not, with reasonable diligence, have been discovered before, but are discovered after the term at which the verdict, report of referee, or decision was rendered or made, the application may be made by petition filed as in other cases; * * * but no such petition shall be filed more than one year after the final judgment was rendered." It is quite clear from the sections quoted that, if the new evidence is discovered during the term at which the cause was decided, although after the decision was rendered, the application for a new trial must be made at that term. Under these circumstances the law exacts of the unsuccessful suitor a high degree of diligence as the price of a new trial. Why should it be less exacting after the adjournment of the term at which the cause was decided? If a defeated litigant elects to abide by the judgment of the district court, the time within which he may move for a new trial is certainly limited to one year from the date of such judgment. Why should he be given a longer period because he is disposed to be litigious? Why should he be permitted to lengthen the time by instituting an appellate proceeding and conducting it leisurely to judgment? We can not believe that the legislature would have required a party to be expeditious and diligent in applying for a new trial at one stage of the case if it intended to allow him to take his own time at another stage. The period of limitation should, it would seem, begin to run from the date of the decision in the district court, for the trial there may, and frequently does, suggest the possible existence of other material evi-

dence. The trial in this court, however, reveals nothing with respect to the facts of the case that was not known before.

The petition for a new trial, if presented in apt time, may be entertained by the district court although the cause be pending in this court for review. Such is the obvious meaning of the statute, and such is the construction given like statutes in other jurisdictions. *Cook v. Smith*, 58 Ia. 607; *Gibson v. Manly*, 15 Ill. 140. A party desiring to obtain a new trial under the provisions of section 318 of the Code has, therefore, the right in every case to make his application within one year from the date of the judgment in the district court, and that court has authority to entertain his petition and grant the relief demanded, although the cause may be pending for review in this court. The legislature did not intend to say that the remedy which it provided should be available under all circumstances for one year, and might, at the option of the complaining party, be made available for an indefinitely longer period. This conclusion is in harmony with the dictum of Chief Justice Maxwell in *Bradshaw v. State*, 19 Neb. 644.

The judgment is

*Affirmed.*¹

¹In *Henry v. Allen* (1895) 147 N. Y. 347, 41 N. E. 694, the appellant moved for an order that the case be remanded to the supreme court, where the case had been tried, in order to enable him to move for a new trial. It was denied on the ground that the pendency of the appeal was no bar to a motion in the court below for a new trial. The court said: "If the Supreme Court, in the exercise of its discretion, grants the motion for a new trial, the legal effect will be the vacating of the judgment from which the appeal has been taken to this court, and a motion to dismiss the appeal would then be proper."

HERZ V. FRANK.

Supreme Court of Georgia. 1898.

104 Georgia, 638.

SIMMONS, C. J. * * *

* * * * *

* * * This court has in numerous cases decided, in effect, that where a motion for new trial is made in term

and an order taken for it to be heard in vacation, the term of the court, for that particular case, has not adjourned but is still open. In the case of *Stone v. Taylor*, 63 Ga. 309, Bleckley, J., in treating this subject, said: "The order taken in term, to hear the motion in vacation, put the judge in full possession of the case at the time appointed, and continuances from time to time were had, so that there was no gap or break. It was as if the first day had been lengthened, or all the sittings had taken place at different hours of the same day. * * * He had exactly the same power in that respect as if he had been sitting in term; and so had he in respect to adjourning over from one day to another. When a court is once on foot in a regular, legitimate way, it requires no consent of parties to run it. The law makes it self-supporting. The motion for a new trial did not perish on the judge's hands, but kept its vitality until he passed judgment refusing to grant it. To that judgment a writ of error lies." In many other cases the court has held, that where an order is taken to hear a motion upon a certain day in vacation, unless the judge continues it by another order on that day, he loses jurisdiction of the case. In the case of *Arnold v. Hall*, 70 Ga. 445, a motion for new trial was set for hearing on a particular day, and four days thereafter the judge approved the brief of evidence and granted a new trial. This court held that the judge had no jurisdiction to pass the order approving the brief of evidence or to grant the new trial. The reasons for these decisions must have been that, when the judge failed to act upon the day set in the order, the term of court expired as to the case set for that day. An order, taken in term, to hear in vacation a motion for a new trial, operates, in our opinion, to keep the regular term of the court open as to that particular case until it is passed upon by the judge. * * *

* * * * *

PEOPLE V. BANK OF SAN LUIS OBISPO.

*Supreme Court of California. 1910.**159 California, 65.*

HENSCHAW, J.

Under the Banking Act of 1903, (Stats. 1903, c. 266). action was begun in the name of the people of the state of California by the attorney-general, as contemplated by the provisions of the act, for a decree declaring the defendant Bank of San Luis Obispo insolvent, ordering it into involuntary liquidation and restraining it from the transaction of a banking business. This action proceeded to judgment in accordance with the complaint of the People and a receiver was appointed by the court to administer its affairs in liquidation. On appeal to this court the judgment of the trial court was in all respects affirmed (*People v. Bank of San Luis Obispo*, 154 Cal. 194, 97 Pac. 306), and this judgment became final in September, 1908. On June 19, 1908, the trial court denied the defendant bank's motion for a new trial and from this order an appeal was taken to this court. Pending the decision on this appeal from the trial court's order refusing to grant the motion for a new trial, the Banking Act of 1903, (Stats. 1903, c. 266). under the authority of which this action was prosecuted and these proceedings had, was repealed by the Banking Act of 1909, (Stats. 1909, c. 76), which latter act made no provision for continuing in force any pending proceedings or litigation under the repealed act.

The Bank of San Luis Obispo now moves this court to vacate and set aside the judgment given against it, and to direct the trial court to dismiss this action upon the ground that the repeal of the Banking Act of 1903 put an end to all litigation pending under it, and that within the meaning of the law the action of the People of the State of California against the Bank of San Luis Obispo was litigation pending and undetermined. The principle which appellant invokes has thus been stated: "When a cause of action is founded on a statute, a repeal of the statute before final judgment destroys the right, and a

judgment is not final in this sense so long as the right of exception thereto remains." (1 Lewis' Southernland, Statutory Construction, 2d ed., p. 285.) * * *

* * * * *

* * * In case of a statute conferring civil rights or powers, the repeal operates to deprive the citizen of all such rights or powers which are at the time of the repeal inchoate, incomplete and unperfected. In the case of statutes conferring jurisdiction, the repeal operates by causing all pending proceedings to cease and terminate at the time and in the condition which existed when the repeal became operative. In cases of judgment pending upon appeal, the rule of decision is that the proceedings abate and the judgment falls. But the general expressions to this effect employed in the decisions, are to be read in each case in the light of the facts which are there disclosed. Here the wise admonition of Chief Justice Marshall in *Cohens v. Virginia*, 6 Wheat. 399, (5 L. Ed. 257), applies with peculiar force: "It is a maxim not to be disregarded, that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision. The reason of this maxim is obvious. The question before the court is investigated with care and considered in its full extent, and other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all the other cases is seldom completely investigated." In every case where, after judgment, the proceeding has been declared to be "pending" there will be found a direct appeal from the judgment, which direct appeal either suspended the judgment so that it was not final and enforceable, or, as in *Schooner General Pinkney v. United States*, 9 U. S. 281, (3 L. Ed. 101), worked a removal of the cause to the appellate court, where it was to be tried *de novo*. The reason given why the proceeding must abate under these circumstances is that, because of the suspension of the judgment by appeal, it is without finality; that to give it finality the court of appeals must itself pronounce its judgment, and that in pronouncing its judgment it must be governed by the existing law. There-

fore, when it finds that by the existing law the previous law, under which alone validity could be given to the judgment, has been repealed, the sole prop and foundation for support of the judgment has been removed, and of necessity it must be declared null and void. No case, however, has been found, and we venture to say none can be found, where a judgment which has been affirmed after direct appeal, and has by such affirmance become final during the existence of the statute supporting it, where the judgment itself has been in the process of execution within the law, and where rights have arisen by virtue of this legal execution of the judgment, has ever been held to be destroyed by a repeal of the statute supporting it because the collateral proceeding of an appeal from an order denying a new trial is pending without *supersedeas* or stay-bond. And to this consideration we now come.

* * * In *Harris v. Barnhart*, 97 Cal. 546, (32 Pac. 589), the matter is discussed and the conclusions of the court may be summarized as follows: A motion for a new trial, in the absence of an order of the court to that effect, does not stay or suspend the operation of a final judgment. An action, under section 1049 of the Code of Civil Procedure, is to be deemed pending while an appeal from the judgment is pending, or until the time for such an appeal has expired, but when the judgment upon appeal has been determined by an affirmance of the judgment, or when the time for appeal has expired, the judgment is admissible in evidence as *res adjudicata* and to raise an estoppel in bar of the action. The same ruling as to the effect of a pending motion for a new trial upon the finality of a judgment is declared in *Young v. Brehe*, 19 Nev. 379, (3 Am. St. Rep. 892, 12 Pac. 564), and the soundness of the rule is intimated by the supreme court of the United States in *Hubbell v. United States*, 171 U. S. 203, (18 Sup. Ct. 828, 43 L. Ed. 136), where it is said: "Indeed, it may well be doubted whether the pendency of a motion for a new trial would interfere in any way with the operation of the judgment as an estoppel."

In *Spanagal v. Dellinger*, 38 Cal. 284, it is said: "Under our system, from the entry of the verdict or filing of the findings of the court, the motion for new trial is a kind of episode, or in a certain sense, a collateral proceeding—a

proceeding not in the direct line of the judgment; for the judgment may be at once entered and even executed, while a motion for a new trial is pending in an independent line of proceeding, which ends in an order reviewable on an independent appeal. The motion may be heard and decided and an appeal taken on its own independent record, while the proceedings on and subsequent to the judgment may be still regularly going on, and even an independent appeal taken in that line." And this language is quoted with approval by this court in the later case of *Brison v. Brison*, 90 Cal. 323, (27 Pac. 186); while to the same effect is *Houser & Haines Co. v. Hargrove*, 129 Cal. 90, (61 Pac. 660), and *Knowles v. Thompson*, 133 Cal. 247, (65 Pac. 468). A broad difference exists between the operation and legal effect of a direct appeal from a judgment (which, while the appeal is pending, in the generality of cases operates to stay the judgment absolutely, and in all cases operates to destroy for it any claim of finality), and the "collateral proceeding" of an appeal from an order denying a motion for a new trial taken after the judgment itself has become an enforceable finality by reason of its affirmance upon direct appeal. In the former case the courts, when the law which alone will support the judgment given has been withdrawn, have felt and expressed themselves as unable to proceed further with the litigation, since they themselves must pronounce a judgment, and can pronounce it only under the authority of existing law. In the case of appeal from an order refusing a new trial where no stay has been granted and where, as here, the judgment has become a finality, the decision which the court renders is not upon the judgment appealed from, but upon the order appealed from, and while the effect of its reversal of the order will, of course, be necessarily the setting aside of the judgment, this, after all, is but an incident to the ruling which it makes, which ruling goes not at all to the sufficiency or finality of the judgment, but only as to whether, within familiar rules and limitations, the judgment was fairly given. Herein our motion for a new trial differs essentially from the common-law motion which was always heard and determined before entry of

judgment,¹ so that the appeal from the judgment embraced all questions. Under our system, the appeal from an order denying a new trial is a separate and independent appeal, which, if prosecuted in time, may be taken after the judgment has become final. Excepting when ordered by *supersedeas* or permitted by stay-bond, it in no way suspends the judgment nor interferes with its finality. It is in this respect more in the nature of an equitable bill of review which, while countenanced in proper cases, even after a judgment of affirmance upon appeal, never operated in and of itself to suspend the decree. Indeed it has

¹ The common law rule is in force in several jurisdictions in the United States. Thus in *Whitney v. Karner* (1878) 44 Wis. 563, the court said: "The learned circuit judge who heard and decided this motion, seems to have entertained the opinion that the entry of judgment was no objection to entertaining a motion to set aside the verdict and for a new trial upon the merits; and it is quite probable that such opinion prevails to some extent amongst the circuit judges and members of the bar; but it is in direct conflict with the decision of this court.

"In the case of *Hogan v. State*, [36 Wis. 232], the present learned chief justice says: 'It is certain that at common law, motions for a new trial must be made after verdict and before judgment. It would be no greater absurdity to move for a new trial at common law before verdict, than after judgment.' And in the case of *Scheer v. Keown*, [34 Wis. 349], Chief Justice Dixon says: 'The practice, as indicated by several cases which have come before this court, and so far as we understand, has always been, if the party wishes to move at a subsequent term, on a case or bill of exceptions made or settled, to obtain a stay of proceedings, so as to prevent the entry of judgment until after the motion could be heard and determined.'

"It would seem to be irregular to entertain a motion to set aside a verdict and for a new trial after judgment entered, at the term at which the same was entered, unless such motion was joined with a motion to vacate the judgment also."

But the better rule seems to be the contrary, permitting the motion to be made regularly after judgment entered. Thus in *Woodward Iron Co. v. Brown* (1910) 167 Ala. 316, 52 So. 829, the court said: "Common law courts have inherent power to grant new trials, and at common law the judgment was not rendered until the motion for new trial was disposed of (29 Cyc. 722, 727), but the usage in our courts and others is to enter the judgment when the verdict is returned, and the party has during the term of the court to make the motion for a new trial. The effect of the motion is to suspend the judgment until the motion is disposed of, and if it is granted, it 'wipes out the verdict; no judgment can be rendered on it.' Hilliard on New Trials, p. 59."

In *Conklin v. Hinds* (1871) 16 Minn. 457, the court said: "But the statute gives the right to move for a new trial upon the report of the referee or decision of the judge, and allows no opportunity to make such motion before judgment. The party aggrieved must therefore necessarily have the right to make it after judgment."

In some jurisdictions, by reason of statutes, no proceeding for a new trial can be instituted before judgment. Thus in *McIntyre v. MacGinniss* (1910) 41 Mont. 87, 108 Pac. 353, the court said: "Proceedings on the motion for a new trial were first instituted by MacGinniss by serving his notice of intention after the decision was made, but before entry of judgment. These proceedings were premature. Under the statute, a party intending to move for a new trial may do so by serving his notice within ten days after the notice of entry of judgment, but not before. (Revised Codes, sec. 6796.)"

been so expressly declared by this court in *Fowden Admr. v. Pacific Coast S. S. Co.*, 149 Cal. 151, 154, (86 Pac. 178).

We conclude, therefore, that as the judgment had become final while the statute authorizing the action was in force, its finality is not disturbed by a pending motion for a new trial which does not operate in any way to stay the execution of the judgment; that as the statute authorizes the people upon the relation of the attorney-general to proceed in equity to have the bank declared insolvent, leaving the proceedings governing the action those which generally obtain in the practice of this state, the repeal of the statute did not destroy the right of the appellant to be heard upon this motion for a new trial; that if the appeal from the motion for a new trial should be granted, it would necessarily have the effect of vacating the judgment, and that by virtue of the repeal the action could then no longer be prosecuted; that if, however, the appeal from the order denying the motion for a new trial should be denied and the order affirmed, the repeal of the statute would not affect any proceeding taken under it and under the judgment heretofore affirmed.

* * * * *

Wherefore the motion to vacate and annul the judgment and dismiss the proceedings is denied, and the order denying defendant's motion for a new trial is affirmed.

SHAW, J., LORIGAN, J., MELVIN, J., and SLOSS, J., concurred.

Rehearing denied.

SEWARD V. CEASE.

Supreme Court of Illinois. 1869.

50 Illinois, 228.

MR. JUSTICE LAWRENCE delivered the opinion of the Court:

It is very seldom that a court of chancery will interfere to grant a new trial at law, though its jurisdiction to do so is undoubted. In this case, a bill was filed for that pur-

pose, and the case having been heard on a motion to dismiss the bill, the relief prayed was refused. We are of opinion, however, that the motion should have been overruled, and if, after the cause is at issue and proofs taken, the case made by the bill is sustained, a new trial should be awarded. For the present, we must take the allegations of the bill as true, and they show, not merely that the only evidence upon which the judgment at law was obtained was false, but that the witness who gave it has voluntarily made an affidavit of its falsity before a magistrate, stating his desire to retract the same, and this affidavit is made an exhibit with the bill. This, then, is not a case of conflicting evidence. An unrighteous judgment has been obtained upon perjured testimony, and the perjury is shown, not by uncertain admissions of the perjurer, but by his own oath voluntarily made for the purpose of repairing his wrong. A stronger case could hardly arise. The motion to dismiss should have been overruled, and the defendant required to answer. After the answer is filed and the cause is at issue, it will be incumbent on the complainant to take the testimony of the witness, when the defendant will have an opportunity of cross-examining, and if the witness adheres to the statements of his affidavit, and there is no evidence he has been subjected to corrupt influences, the court will award a new trial.

The decree is reversed and the cause remanded.

*Decree reversed.*¹

1“Applications to courts of chancery, for the purpose of granting new trials at law, and the interposition of the Chancellor, whenever a proper case is made out, may be warranted as well upon the score of principle as of precedent.

“An injunction to stay proceedings upon an unjust judgment, and for a new trial, is a remedy recognized and approved by courts of equity. These remedies are to be enforced under the operation of established forms and rules of proceeding, instituted as they are for the development of truth and justice.

“Anciently, courts of equity exercised a familiar jurisdiction over trials at law, and compelled the successful party to submit to a new trial, or to be perpetually enjoined from proceeding on his verdict. (Floyd v. Jayne, 6 John. Ch. Rep. 479.)

“But this practice, except in cases the most extraordinary, has long since gone out of use; because courts of law are now competent to grant new trials, and are in the constant exercise of that right to a most liberal extent. Anciently, courts of law did not grant new trials; and in those days, courts of equity exercised that jurisdiction over trials at law, and compelled the successful party to submit to a new trial when justice required it. But, even in that age, the Court of Chancery proceeded with great caution. A new trial was never granted, unless the application was founded upon some clear case of fraud or injustice, or upon some newly discovered evidence,

which the party could not possibly, by any vigilance or industry of his, have had the benefit of, on the first trial.

* * * * *

“In general, where it would have been proper for a court of law to have granted a new trial, if the application had been made while that court had power to do so, it is equally proper for a court of equity to grant a new trial, if the application be made on grounds arising after the court of law ceased to have power to act.

“The general rule is, that courts of chancery will not interfere after verdict and judgment at law, except in cases of fraud, or in extraordinary cases where manifest injustice would be done; nor where the party might have defended himself fully at law and neglected it. Great abuse would be made of a contrary doctrine, by drawing within the jurisdiction of equity, as by a side wind, almost all causes decided at law. The high powers intrusted to Chancery, to promote the purposes of justice, should not be abused to the vexation of citizens, and the unsettling solemn decisions of other courts, where it is always to be presumed that full justice has been done.” 3 Graham & Waterman on New Trials, 1455 et seq.

For a further discussion of this subject see: Black on Judgments, § 357; Freeman on Judgments, § 485; 3 Pomeroy's Equity Jurisprudence, § 1365; Yancy v. Downer (1824) 5 Littell (Ky.) 8, 15 Am. Dec. 35; Wynne v. Newman's Adm'r (1881) 75 Va. 811; Kansas & Arkansas Valley R. R. Co. v. Fitzhugh (1895) 61 Ark. 341, 33 S. W. 960.

SECTION 13. FORM OF MOTION.

MEMPHIS STREET RAILWAY COMPANY V. JOHNSON.

Supreme Court of Tennessee. 1905.

114 Tennessee, 632.

MR. JUSTICE SHIELDS delivered the opinion of the Court.

This action is brought by W. B. Johnson against the Memphis Street Railway Company to recover damages for personal injuries sustained by him, through the negligence of the defendant, while plaintiff was a passenger on one of its cars.

The case was submitted to a jury, and a verdict found for the plaintiff. The motion of the defendant for a new trial was overruled, and judgment entered. The defendant tendered a bill of exceptions to this action of the court, which was signed and filed, and the case is now before us upon appeal in the nature of a writ of error.

The errors assigned are predicated upon the refusal of the trial judge to set aside the verdict of the jury and grant the defendant a new trial because of the admission of cer-

tain evidence offered by the plaintiff over the objection of the defendant, and his refusal to give in charge to the jury certain written instructions submitted by counsel for the railway company at the conclusion of the charge in chief.

For the defendant in error it is insisted that these assignments of error cannot be considered by this court because the errors complained of were not properly set out and relied upon as grounds for a new trial in the motion made by the plaintiff in error in the trial court for that purpose, as required by a rule of that court, and passed upon by the presiding judge.

The rule of the circuit court of Shelby county in relation to motions for new trials, which is in the record, requires all grounds upon which a new trial is asked to be stated and set out separately in a written motion and entered upon the minutes of the court; and all errors not so set out are presumed to be waived, and will not be considered on the hearing of the motion.

The plaintiff in error attempted to comply with this rule, and the grounds for a new trial upon which these assignments are based are stated in its motion in these words:

“(1) For error in the admission and exclusion of evidence.

“(2) The court erred in refusing the special instructions asked by the defendant.”

The jurisdiction of this court is exclusively appellate, and it can only pass upon matters which the record shows have been considered and adjudged by the trial court from which the case has been appealed. The errors reviewed and corrected by it are of two classes: Those which appear upon the face of the record proper, as erroneous rulings in sustaining or overruling motions, and demurrers challenging the sufficiency of pleadings; and errors committed in allowing or overruling motions for new trials upon grounds brought into the record by bills of exceptions, as for improperly refusing a continuance, the admission of incompetent evidence, or the rejection of competent evidence, error in instructing the jury, or refusing further instructions seasonably requested in proper form, for want of evidence to sustain the verdict, or other similar ground. It does not act directly upon errors of the latter class,

which are not a part of the record without a bill of exceptions, but upon the action of the trial judge for refusing a new trial because of such errors committed by him, or otherwise occurring in the progress of the case, as they may be waived or corrected before verdict. Therefore, before the jurisdiction of this court can be invoked and relief had on account of errors of the second class, they must be considered and acted upon by the trial judge in the disposition of a motion made by the losing party to set aside the verdict of the jury and allow him a new trial. Another reason why all errors which may affect the integrity of the verdict should be brought to the attention of the trial judge in a motion for a new trial is that he may have an opportunity to correct them, if necessary, by granting a new trial, and thus save the inconvenience, delay, and expense attending appellate proceedings.

* * * * *

We are now to determine whether or not the grounds upon which these assignments of error are predicated are sufficiently set out in the motion for a new trial. It seems to be well settled that the statement of the grounds in the motion must be sufficient to direct the attention of the court and opposing counsel to the error or irregularity relied upon to vitiate the verdict.

In the work on Pleading & Practice last quoted from, it is further said: "The general rule is that the grounds (for a new trial) must be stated so specifically as to direct the attention of the court and opposing counsel to the precise error complained of. A mere statement of the grounds, without further specifications, will therefore be insufficient. The purpose of the rule is to direct the attention of the trial judge to the alleged erroneous rulings, and present to the appellate court the precise question involved. The safest course is to assign each error with the same particularity of an assignment of error in appeal. * * * But this is not the practice in most of the States; the courts holding that it is sufficient merely to assign error in giving a certain construction or admitting certain evidence, without stating why such ruling was erroneous. If the grounds for a new trial are not stated in the motion, it may be overruled by the court, and disregarded on appeal. All errors known at the time of filing the motion must be in-

cluded therein, or the errors omitted will be deemed to have been waived." *Ency. of Plead. & Prac.*, vol. 14, pp. 882, 883.

Mr. Elliott, in his work above cited (volume 2, section 991),¹ says: "The law presumes the verdict to be correct. Hence on a motion for a new trial the party must set forth the grounds upon which he intends to rely, or the objections will be considered as waived. The motion should be in writing, and should specify with reasonable certainty all the rulings deemed to be erroneous. It is to be kept in mind that it is the objections specified in a motion, and those only, that are brought up for review, for all others properly arising on a motion for a new trial are deemed to be waived. It is on a motion—as it is written—that the appellate court acts, for, as to objections not properly presented, the presumption is in favor of the regularity and legality of the rulings of the trial court. It is the business of the party who takes exceptions to show that the decision is wrong. It is not sufficient that he succeeds in mystifying it by adopting language which subjects the judge to the suspicion that he did not understand the safest ground on which to place it. In order to show that rulings are wrong it must appear that they were probably injurious to the party who makes complaint, since a mere harmless error will not warrant a reversal."

The text in both of these works, which are of the highest authority, is supported by numerous decisions of other States, many of which are predicated upon the general rules of practice of courts of law.

We are of the opinion that the grounds set out in the motion should be as specific and certain as the nature of the error complained of will permit. Thus, if the error consists in the admission or rejection of evidence, the evidence admitted or rejected should be stated. If it be for affirmative error in the charge, or for failure to give an instruction properly and reasonably presented, it should set out the portion of the charge complained of, or the instruction refused, or otherwise definitely identify the instruction. If it be for misconduct of the opposite party or that of the jury, the facts constituting it should be stated. This was not done in this case. The testimony admitted and

¹ Elliott on General Practice.

that excluded is not stated—not even the name of the witness given—and the instructions requested are not set out or sufficiently identified.

We do not think that it is necessary to state why the ruling complained of is erroneous as fully and with all the strictness required in assignments of error in this court, but a fair statement of the error complained of, sufficient to direct the attention of the court and the prevailing party to it, is all that is required.

Nor was it necessary for the successful party in the court below to there object to the form of the motion, because rules of this character are made in the interest of the public, and for the purpose of enabling the courts to speedily and correctly dispose of the cases pending in them, and they cannot be waived by litigants.

We are of the opinion that no sufficient grounds for a new trial because of the admission of incompetent or rejection of competent testimony, or a failure to give in charge to the jury instructions submitted by the defendant, were stated in the motion made by it in the circuit court, and that there is therefore nothing upon which these assignments of error on the action of the trial judge in refusing to set aside the verdict and grant a new trial can be predicated; and, under the practice of his court, in cases coming from those courts having rules like that in this record, not to consider the assignments of error upon any ground not appearing in the motion for a new trial, these assignments of error are insufficient, and must be overruled.

The other assignments of error filed by the plaintiff in error were disposed of in an oral opinion.

KING V. GILSON.

Supreme Court of Missouri. 1907.

206 Missouri, 264.

WOODSON, J. * * *

* * * * *

The motion for a new trial was filed on March 27, 1906,

and one of the grounds assigned therefor is in words as follows:

"11. Because, since the trial of this cause, the defendants have discovered new and important evidence material to the issues submitted to the jury, which evidence is not cumulative in character and which evidence was unknown to defendants at the time of the trial."

On the same day the court granted defendants ten days in which to file affidavits in support of motion for new trial; and within that time they filed the affidavits of Dr. Waterhouse, Arthur Marshall, Edward Unwin and J. H. Orr, one of the attorneys for the defendants, the three latter stating what diligence they had used in trying to discover all the witnesses and evidence in the case.

The plaintiffs contend that the action of the court in granting a new trial on the ground of newly-discovered evidence was erroneous.

The motion for new trial does not disclose or set out the newly-discovered evidence or its nature, nor does it give the names or addresses of the witnesses by whom the newly-discovered evidence was to be given, nor was there any affidavit filed with the motion.

The motion simply states that, "since the trial of this cause, the defendants have discovered new and important evidence material to the issues submitted to the jury, which evidence is not cumulative in character, and which evidence was unknown to the defendants at the time of the trial."

This question has been before this court repeatedly, and there is nothing new to be said upon it.

In the case of *State v. David*, 159 Mo. 1. c. 535, this court said: "A new trial was also asked upon the ground of newly-discovered evidence, but the evidence was not set out in the motion. The mere fact, asserted in the motion, that the newly-discovered evidence was material, did not prove it to be so. It should have been set out in order that the court might pass upon its materiality. For these reasons, besides others unnecessary to mention, this question cannot be considered by this court."

And in the case of *State v. Welsor*, 117 Mo. 1. c. 582, the law applicable to this question was stated in the following language: "In the case of *State v. Ray*, 53 Mo. 349, Judge

Sherwood, in delivering the opinion of the court, says: 'In *the State v. McLaughlin*, 27 Mo. 111, this court adopts, with most cordial approval, the rules as laid down in *Berry v. State*, 10 Ga. 511, by Judge Lumpkin, in respect to new trials, on the ground of newly-discovered evidence, as follows: "The application must show, first, that the evidence has come to his knowledge since the trial; second, that it was not owing to the want of due diligence that it did not come sooner; third, that it is so material that it would probably produce a different result if the new trial were granted; fourth, that it is not cumulative; fifth, that the affidavit of the witness, himself, should be produced, or its absence accounted for; sixth, that the object of the testimony is not merely to impeach the character or credit of a witness."' See, also, to the same effect, *State v. Rockett*, 87 Mo. 666; *State v. Butler*, 67 Mo. 63; *State v. Carr*, 1 Fost. (N. H.) 166."

In the case at bar, the affidavits were not filed in support of and in proof of the newly-discovered evidence stated in the motion for a new trial, because, for the very obvious reason, there was no such evidence stated therein; but the object and purpose in filing them was to bring the evidence itself and not the proof thereof to the attention of the court. The law requires such evidence to be set out in the motion; and the mere fact that it is so stated does not prove it to be true, and for that reason its truthfulness is required to be established by affidavits. But here the defendants are trying to make the affidavits serve a two-fold purpose; first, a ground for a new trial, and, second, proof of the statements constituting that ground. This cannot be done. The motion for a new trial must be filed within four days after the trial, and the court has no power to extend the time for filing it. If the evidence is set out in the motion, then this court has repeatedly held that the trial court may give the parties time in which to file affidavits in support thereof.

The defendants state in their motion that they have discovered new evidence; that it was material to the issues; that it was not cumulative, and that if admitted in evidence probably a different result would be reached if a new trial was granted. If they knew such evidence existed at the time the motion was written, why did they not incorporate

it into the motion and later file the affidavits in support thereof?

If such a practice as is contended for in this case was permissible, it would enable the parties to supplement and add to their motion for a new trial after the expiration of the four days allowed for filing it, and thereby open the door to temptation and fraudulent conduct in bolstering up motions for new trials.

* * * * *

[*Affirmed on other grounds.*]

RUTHERFORD V. TALENT.

Supreme Court of Montana Territory. 1887.

6 Montana, 112.

WADE, C. J.

This is a motion to dismiss the appeal for the reason that no sufficient notice of motion for a new trial was given, and that no motion for a new trial was filed.

The Code, section 287, provides that the party intending to move for a new trial must file with the clerk, and serve upon the adverse party, a notice of his intention, designating the grounds upon which the motion will be made, and whether the same will be made upon affidavits, minutes of the court, bill of exceptions, or a statement of the case.¹

¹ Various methods have been devised by which the data necessary for the determination of a motion for a new trial may be presented to the court.

1. *The minutes of the court may be used.* These being deemed already in existence and before the court, a party moving upon them is required to prepare no abstract or statement of the proceedings in the case, upon which to base his claim for relief.

"The term 'minutes of the court,' as used in subdivision 4, § 5090, Comp. Laws, seems to have no well-defined legal meaning, but is evidently used in that section as referring to such minutes as the judge may make of the evidence, and to his recollection of the same, and is evidently intended to relieve a party from the expense and labor of preparing a statement or bill of exceptions. To require the party moving for a new trial upon the minutes of the court to procure a transcript of the stenographer's notes, and cause the same to be filed, would, in effect, impose upon him a greater burden than preparing a bill of exceptions or statement." *Distad v. Shanklin*, 11 S. D. 1.

2. *It may be made upon a bill of exceptions or statement of the case.* By this means a statement of the evidence and other proceedings had upon the trial, so far as material to the questions raised by the motion, is written

The notice of motion was as follows:

“Said motion will be made and based upon the following grounds:

“1. That the findings or decision of the court is against the law and the evidence.

“2. Errors of law occurring at the trial, and then and there duly excepted to by the defendant, to wit : The court erred in sustaining plaintiff’s motion to strike out the evidence of Patrick Talent, the defendant, including the letters of defendant to plaintiff, and plaintiff’s letters to defendant; the court erred in refusing to allow defendant to prove that he was the trustee of the property mentioned in the deeds from Adam Rutherford to defendant and from defendant to plaintiff, and that the plaintiff was the sole beneficiary of said property. Said motion will be made and based upon the minutes of the court, the statement of the case, and bill of exceptions.”

There was a statement of the case, and it was stipulated by the attorneys of the respective parties that the statement might be used on the motion for a new trial.

If this notice was defective in not making known whether the motion for a new trial would be made upon affidavits, minutes of the court, bill of exceptions, or statement of the case, as required by the statute, this stipulation that the statement of the case might be used on the hearing of such motion would cure the defect.

The office of the notice is to inform the adverse party of the grounds of the motion, and the errors relied on for obtaining a new trial. The notice in question performs that office. It sufficiently designates the errors complained of, and the adverse party, by his own agreement, has stipulated that the statement of the case might be used upon the consideration of the questions raised by the motion for a new trial. He is not, therefore, in a situation to complain that the notice does not give him all the information that the law provides that he shall have.

out at large, and settled as correct by the attorneys or the court, and thereupon such statement becomes the exclusive source of information as to what took place upon the trial, and the sole foundation for the motion so far as it relates to the trial itself.

3. *It may be made upon affidavits.* This method is to be employed when matters outside the proceedings at the trial are to be brought to the attention of the court as a basis for the relief asked. It is commonly used in connection with, and supplementary to, the other two methods.

If the notice designates the grounds upon which the motion for a new trial can be based, it is not necessary to make a formal, written motion, repeating the errors assigned in the notice.

A motion is an application for an order. If this notice is what the law requires, and has been duly served on the adverse party, no formal, written application, in addition to the notice, is necessary in order to bring the motion for a new trial to a hearing.

The notice is the only written motion required by the statute, and we know of no rule of court requiring such motion to be in writing.

The motion to dismiss the appeal is overruled.

SECTION 14. AFFIDAVITS.

VOSE V. MAYO.

*United States Circuit Court for the District of
Maine. 1871.*

3 Clifford, 484.

CLIFFORD, Circuit Justice.

Power to set aside a verdict before judgment and grant a new trial is vested in the circuit courts "in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the courts of law," and the correct mode of applying to the court for the exercise of that power is by a motion for new trial, which, under the rules of the circuit court in this circuit, must be made in writing, and must, unless the time is enlarged by leave of the court, be filed within two days after the verdict. Such a motion must assign the reasons for the application, and when the motion is grounded on facts not within the knowledge of the presiding justice, and not appearing in his minutes, it must be verified by affidavit, unless the requirement is waived by the opposite party. No affidavit of merits, however, is required when the motion is properly addressed to the minutes of the presiding justice, as where the motion is to set aside the verdict for error of ruling in admit-

ting or rejecting evidence, or for refusing to instruct the jury as requested, or for misdirection, or because the verdict is against law, or against the evidence or the weight of the evidence, as the theory of the motion in all such cases is, that all the matters of fact alleged in the motion are within the knowledge of the presiding justice, or that they may be verified by reference to his minutes taken at the trial.

Where the motion is for new trial on account of newly discovered evidence, or where the motion is grounded on the charge that the opposite party or the jury were guilty of misconduct in respect to the trial, the rule is different, as the motion in such cases presents a preliminary question whether the facts and circumstances disclosed are such as to make it the duty of the court to order notice to the opposite party, and to direct the mode in which the proofs shall be taken, and in all such cases the motion must be in writing, and must, unless the requirement is waived, be supported by affidavit. *Johnson v. Root* (Case No. 7, 409); *Hill. New Trials*, 393, sec. 35; *Macy v. De Wolf* (Case No. 8, 933).

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DRAPER V. TAYLOR.

Supreme Court of Nebraska. 1899.

58 Nebraska, 787.

SULLIVAN, J.

* * * * *

Immediately after the court announced its findings and rendered its decree Draper and King, each for himself, filed a motion for a new trial based in part on a claim of newly-discovered evidence. Each motion was supported by the affidavit of the attorney representing the parties and was in substance the same as the affidavit previously filed in support of the motion to re-open the cause. Both motions were overruled, and Draper assigns this action of the court for error. His contention is that he made a showing of newly-discovered evidence which ought to have

procured for him a new trial of the issue. Without deciding whether there was a sufficient showing of diligence, and without discussing the character of the new evidence and its probable influence as a factor in another trial, we think the district court made no mistake in refusing to vacate its decree. It is our understanding of the rule that not only must counsel not have known of the evidence upon which the application is based, but the applicant himself must have been ignorant of its existence. To be sure the affidavit states that "neither defendants nor their counsel, by reason of the nature of the evidence, * * * were able sooner to discover said evidence," and "because knowledge of the existence thereof could be but very indefinitely known to any of the parties to the action except the plaintiff." No affidavit was filed by Draper or King, and how their attorney could know that they were ignorant of the facts set out in his affidavit is something we are not quite able to comprehend. At best his statement in regard to the matter is the merest hearsay. (14 Ency. Pl. & Pr. 823; Hilliard, *New Trials* (2d ed.) 499; *State v. Kellerman*, 14 Kan. 135; *Broat v. Moor*, 44 Minn. 468; *State v. Campbell*, 115 Mo. 391.) There should also have been presented in support of the motion the affidavit of the new witness stating the facts to which he would testify, or there should have been a satisfactory reason given for not obtaining such affidavit. (*Hand v. Langland*, 67 Ia. 185; *Quinn v. State*, 123 Ind. 59; *McLeod v. Shelly Mfg. Co.*, 108 Ala. 81; 14 Ency. Pl. & Pr. 825).

* * * * *

PHILLIPS V. RHODE ISLAND COMPANY.

Supreme Court of Rhode Island. 1910.

32 Rhode Island, 16.

JOHNSON, J.

This is an action of the case, brought by Samuel Phillips against The Rhode Island Company, to recover damages for personal injuries alleged to have been sustained

through the negligence of the defendant company in the operation of one of its street cars.

On April 21st, 1905, the plaintiff was driving a heavy wagon, loaded with oats, drawn by one horse, and was proceeding in an easterly direction from Promenade street across Canal street into Steeple street, in the city of Providence. Canal street running north and south intersects Steeple street running east and west, and Promenade street runs into Canal street nearly opposite Steeple street. The defendant company had a single track running through Steeple street into Canal street, which track, just before reaching the intersection with Canal street, curved in a southerly direction towards the corner of Steeple and Canal streets and extended across Canal street. At the time in question the plaintiff's wagon, going in an easterly direction, had just crossed the tracks in Canal street—fifteen or twenty feet westerly from the crosswalk at the foot of Steeple street—in order to proceed easterly on the southerly side of Steeple street. Near the crosswalk on Steeple street his wagon came in contact with a car of the defendant company which came down Steeple street towards Canal street, and the plaintiff was thrown to the ground and sustained the injuries complained of. The case was tried in the Superior Court with a jury on the 21st, 24th, and 25th days of January, 1910, and a verdict was rendered for the plaintiff in the sum of twenty-five hundred dollars. Thereupon the defendant moved for a new trial, alleging as grounds therefor:

* * * * *

Fourth: That certain members of the jury before whom said cause was tried were guilty of misconduct in this, that during the progress of said trial, and without the consent of the court, without the knowledge and consent of the attorneys for the defendant, did take an unauthorized view of the premises where the accident occurred, concerning which said action was brought and prosecuted.

Fifth: That certain members of said jury during the progress of said trial did take an unauthorized view of the premises where the accident occurred, concerning which said action was brought and prosecuted, without the knowledge and consent of the defendant, and under such circum-

stances as to be calculated to lead a jury into error in the determination of said case.

Certain affidavits were filed by the defendant in support of said motion. The defendant's motion for a new trial was denied by the justice who presided at the trial, and the case is now before this court on the defendant's bill of exceptions.

The exceptions pressed by the defendant are to the denial of its motion for a new trial upon the several grounds stated therein, the other exceptions stated in the bill being waived.

From an examination of the evidence, which was conflicting, we are not able to say that the jury was not justified in returning a verdict for the plaintiff, or that the damages are excessive.

Upon the question of unauthorized views alleged to have been taken by two of the jurors, the affidavit of one juror was introduced stating that in coming from the restaurant where he had been to dinner, he paced the distance from the restaurant to the corner of Canal street, and measured in his mind the distance from the south curbing on Steeple street to the car track and thought it was not enough for a car and team to pass. An affidavit was also introduced stating that another juror had told the affiant that he, said juror, on Monday, January 24th, went alone to the place of the accident, to see how near his eye measurement would come to that stated in court; that he walked down Steeple street, on the south side of the street, and as he was walking along he thought in his own mind that the distance from Allen & Northup's restaurant to the corner of Canal street was about what was stated in court; that as he was walking towards the corner of Canal street he had a good view of the space from Steeple street south curbing to the car track, and thought in his own mind that the distance was less than that stated in court; that he thought it would be a close squeeze for a car and team to pass each other when the car was on the curve; that he thought in his own mind that if the car was on the straight track on Steeple street that the team could have passed all right. This juror, by his affidavit on file, denied making the statements attributed to him by said affiant, and stated that the only

view he had of the place of the accident was when the jury took a view, January 21, 1910.

* * * * *

It is well settled in this State that the affidavits of jury-men as to what takes place in the juryroom are inadmissible to impeach their verdict. In *Tucker v. Town Council of South Kingstown*, 5 R. I. 558, 560, the court, speaking by Ames, C. J., said: "The affidavits of the jury-men as to what took place in the jury-room, or as to the grounds upon which they found their verdict, and which were read *de bene* at the hearing, must be rejected; a rule of policy, well settled both in England and in this country, excluding, for the security of verdicts, this mode of impeaching them."

The general rule that the affidavits of jurors as to their own misconduct during the trial are inadmissible to impeach their verdict is, we think, supported by the great weight of authority both in this country and in England. In *Owen v. Warburton*, 4 Bos. & Pull. 326, where the affidavit of a jurymen, that the verdict was decided by lot, was offered, Mansfield, Ch. J. (pp. 329-330), said: "We have conversed with the other judges upon this subject, and we are all of the opinion that the affidavit of a jurymen cannot be received. It is singular that almost the only evidence of which the case admits should be shut out; but, considering the arts which might be used if a contrary rule were to prevail, we think it necessary to exclude such evidence. If it were understood to be the law that a jurymen might set aside a verdict by such evidence, it might sometimes happen that a jurymen, being a friend of one of the parties, and not being able to bring over his companions to his opinion, might propose a decision by lot, with a view afterwards to set aside the verdict by his own affidavit, if the decision should be against him." In *State v. Freeman*, 5 Conn. 348, the court, by Hosmer, C. J. (p. 351), said: "In this state, it has been the practice to admit such testimony; but, said Ch. J. Swift (1 Dig. 775.), 'In England, and in the courts of the United States, jurors are not permitted to be witnesses respecting the misconduct of the jury; for it is a great misdemeanor; and this is most unquestionably the correct principle; for otherwise, a juror, who should be disposed to set aside a verdict, would give information to the party for that purpose; if not so dis-

posed, he could suppress the information; and, in that way, any of the jury could command the verdict.'

"The question before us regards a point of *practice*; and as this cannot have any consequences antecedent to this case, it is competent for the court to decide, unshackled by precedent, and change the rule, if justice requires it." * * *

"If the question depended merely on equitable grounds, as relative to the immediate parties to the suit, the testimony in question, perhaps, ought to be received. But there are higher considerations to be resorted to. On a principle of policy, to give stability to the verdicts of jurors, and preserve the purity of trials by jury, the evidence ought not to be admitted. The reasons assigned by Sir James Mansfield, in *Owen v. Warburton* and by Ch. J. Swift, in his digest, are of great weight. The sanctioning of the testimony of one juror, relative to the misbehaviour of the rest, would open a door to the exercise of the most pernicious arts, and hold before the friends of one of the parties, the most dangerous temptation. By this capacity of penetrating into the secrets of the jury-room, an inquisition over the jury, inconsistent with sound policy, as to the manner of their conduct, and even as to the grounds and reasons of their opinions, might ultimately be established, to the injury and dishonour of this mode of trial; imperfect, undoubtedly, but the best that can be devised. And under the guise of producing equity, there might be generated iniquity, in the conduct of the jurors, more to be deplored than the aberration from law, which, undoubtedly, sometimes takes place.

"The opinion of almost the whole legal world is adverse to the reception of the testimony in question; and, in my opinion, on invincible foundations."

In the cases cited *supra*, the affidavits of the jurors were offered as to their misconduct in the juryroom. Where the affidavits of jurors have been offered as to their misconduct outside of the juryroom to impeach their verdict, the same rule of public policy has generally been applied by the courts. Thus in *Chadbourn v. Franklin*, 5 Gray 312, where defendant moved for a new trial, and in support of the motion offered one of the jurors as a witness to show that on the Sunday intervening, while the trial was

in progress, said juror went to the place where the collision occurred, and examined it for the purpose of informing himself upon the subject-matter of the trial, and the judge below ruled that the juror could not be permitted to testify, in support of this motion, to these acts tending to show his own misconduct, and the defendant excepted, the court, Shaw, C. J. said: "The modern practice has been uniform, not to entertain a motion to set aside a verdict on the ground of error, mistake, irregularity or misconduct of the jury, or of any of them, on the testimony of one or more jurors; and it rests, we think, on sound considerations of public policy." In *Rowe v. Canney*, 139 Mass. 41, 42, the court, by Morton, C. J. said: "The same considerations of public policy protect the communications of jurors with each other, whether in or out of the jury-room, during the pendency of the case on hearing before them." See also *Commonwealth v. White*, 147 Mass. 76, 80.

In *Sanitary District v. Cullerton*, 147 Ill. 385, the affidavits of three of the jurors were offered touching the conduct of others of the jury, and the bailiff in charge, tending to impeach the verdict. It was complained that after they had finished viewing the premises some of the jurors drank intoxicating liquor. The court, p. 390, said: "This court, in an unbroken line of decisions from the case of *Forrester v. Guard*, Breese, 44, is committed to the doctrine that the affidavits of jurors can not be received for the purpose of showing cause for setting aside the verdict. There may be *dicta* in some of the cases intimating a contrary rule, but in every case where the question has been before the court, and determined, the principle has been adhered to;" and again, p. 391: "In trials in the courts of justice not only should there be absolutely nothing improper permitted, but, to the end that respect for the administration of the law may be maintained, the very appearance of evil should be avoided, and the courts are clothed with ample power to punish, appropriately, the misconduct of jurors, and of others in their presence, and no court ought to hesitate to impose adequate penalties and set aside verdicts where there has been conduct by which the jury may have been improperly influenced, or the verdict has been the result of improper conduct on the part of jurors. But to permit the affidavits of jurors to be heard, showing that

the verdict to which they, on their oaths, consented, was the result of improper influence or corrupt practice, 'is condemned by the clearest principles of justice and public policy.' But few verdicts in important cases would be permitted to stand. Litigants, in whose favor verdicts might be rendered, would be placed at the mercy of corrupt jurors. Litigation would be increased, the widest door thrown open to fraud and perjury, and the administration of the law brought into contempt."

In *Heldmaier v. Rehor*, 90 Ill. App. 96, the court, at p. 98, said: "Upon motion for a new trial, affidavits were presented, stating that two of the jurors admitted after the trial, that, during its progress, they examined a stone-wagon to ascertain whether the boy could have been rolled under such a wagon as appellee's testimony tended to show he had been. This was a controverted point. The wagon said to have been so examined was not that by which the injury was inflicted. It is claimed that by reason of such alleged misconduct of the jurors the verdict should have been set aside. The affidavits purport to show that the jurors expressed themselves after the verdict, as satisfied, from such examination, that there was ample room for the boy's body under the platform of such a wagon. These affidavits are not by the jurors themselves, but by the defendant and others. It is settled law in this state that the affidavits of jurors can not be received for the purpose of showing cause for setting aside a verdict. *Sanitary District v. Cullerton*, 147 Ill. 385, and cases there cited. If affidavits of jurors themselves can not be so received, it is apparent that affidavits setting forth statements made by jurors after the close of a trial, must be equally inadmissible. If these affidavits could be considered and were to be accepted as stating facts, the judgment of the two jurors in question would appear to have been influenced by incompetent evidence which could not have been admitted at the trial. The jury are required to rely on the evidence introduced in court and are not permitted to obtain it outside. But to permit the introduction of affidavits to impeach the conduct of jurors upon hearsay statements said to have been made by them, or even upon their own affidavits, after their connection with the case has terminated and they have been discharged, would open the

door to endless attacks upon verdicts, invite fraud, and place litigants at the mercy of jurors dissatisfied, or open to corrupting influences."

In *Clark v. Famous Shoe Etc. Co.*, 16 Mo. App. 463, the court, p. 467, said: "We have also examined the defendant's complaint founded on the alleged misconduct of a juror. That misconduct consisted, as the record shows, of the juror going to the building where the accident occurred, after the trial began, inspecting it and making some measurements, for the purpose, as he says, of verifying the correctness of the plats offered in evidence, and of seeing whether the place was dangerous. The general rule undoubtedly is that the triers of the fact should derive their information from the evidence offered on the trial of the cause and the law as given to them by the court. They are sworn to do so and are guilty of misconduct if they violate their oaths in that regard. If the misconduct of the juror in this case would have been substantiated by anything beyond his own testimony, we would have felt at liberty to consider it, and determine whether it was such as to deprive the plaintiffs who were wholly innocent of the benefit of their verdict. But the only evidence found in the record of the alleged misconduct of the juror, is his own testimony given in court upon the hearing of the motion for a new trial. This testimony we are not at liberty to consider, nor should the trial court have considered it, because under the rule now prevailing in this state, the testimony of a juror tending to impeach his verdict, can not be received, and it seems to make no difference in that regard, whether the alleged misconduct took place in or out of the jury-room."

* * * * *

In *Deacon v. Shreve*, 22 N. J. L. 176, the court said, at page 182: "The principle is now well settled, that generally the affidavits of jurors shall not be received as to what took place in the jury-room, or elsewhere, to show misbehaviour, or on the delivery of the verdict to show mistake, for the purpose of correcting or destroying the verdict, though it seems their affidavits are admissible for the purpose of exculpation. The rule stands on the ground of public policy, courts being unwilling to permit a dissatis-

fied juror by such means to destroy a verdict to which he had given a public assent."

In *Downer v. Baxter*, 30 Vt. 467, after the case had been given to the jury, the officer in charge allowed the jury to separate, and they went to their respective boarding-houses for dinner, returning thence to the juryroom and resuming the consideration of the case. The affidavits of all the jurors were read, stating that after they were impanelled to try the cause they had no conversation with any one touching it, except among themselves. The court, p. 475, said: "An objection was taken to the competency of the affidavits of the jurors and their admissibility raises a legal question which we are called upon to decide. We think the true rule is, that the affidavits of jurors may be read to exculpate themselves and sustain their verdict, but not to impeach it. In this case they were offered to show that the jurors had no conversation with others, nor heard any in relation to the cause."

In *Siemens v. Oakland, etc., Electric R. Co.*, 134 Cal. 494, where an unauthorized view was alleged, the court said, p. 497; "However the rule may be in other states, it is settled in this beyond controversy that a juror may impeach his own verdict upon no other ground than that designated by the code (citing cases). It is sought by respondent, upon this motion, to make a distinction between the misconduct of a juror before retiring, and the misconduct of a juror during retirement; but to this it may be said, in the language of *Boyce v. California Stage Co.*, 25 Cal. 463: 'In conclusion, upon this branch of the case we may add that a line of judicial decisions which struggles to multiply exceptions to a plain and simple rule founded on considerations of the wisest policy, is not to be favored; on the contrary, the struggle should be to bring every case within the rule, lest the rule itself become shadowy, and in time wholly disappear in a multitude of exceptions.' " See also *Pickens v. Boom Co.*, 58 W. Va. 19; 29 Cyc. 982, 983, and cases cited: Thompson and Merriam on Juries, sec. 440 and cases cited.

In some States affidavits of jurors as to their own misconduct outside the juryroom during the trial are admitted to impeach their verdict. *Pierce v. Brennan*, 83 Minn. 422; *Peppercorn v. Black River Falls*, 89 Wis. 38;

Roller v. Bachman, 5 Lea. 153. In Iowa it has been held that affidavits of jurors may be received, for the purpose of avoiding a verdict, to show any matter occurring during the trial, or in the juryroom, which does not essentially inhere in the verdict itself. *Wright v. I. & M. Tel. Co.*, 20 Iowa, 195. This was a case of misconduct in the juryroom. This rule has been followed in Kansas,—*Perry v. Bailey*, 12 Kan. 539. We are not, however, convinced by the reasoning of these cases. We are of the opinion that the affidavits of jurors as to their own misconduct in or out of the juryroom during the trial are inadmissible to impeach their verdict. The objection on the ground of public policy is just as strong in the one case as in the other. The affidavit of the juror in this case was inadmissible as to his own misconduct in taking an unauthorized view, to impeach the verdict, and therefore can not be considered. An affidavit to the declaration of a juror impeaching the verdict, besides contravening the same rule of policy, is condemned by the ordinary rule of evidence, excluding hearsay testimony.

The defendant's exceptions are overruled, and the case is remitted to the Superior Court with direction to enter judgment upon the verdict.

MATTOX V. UNITED STATES.

Supreme Court of the United States. 1892.

146 United States, 140.

This was an indictment charging Clyde Mattox with the murder of one John Mullen, about December 12, 1889, in that part of the Indian Territory made part of the United States judicial district of Kansas by section two of the act of Congress of January 6, 1883, (22 Stat. 400, c. 13,) entitled "An act to provide for holding a term of the District Court of the United States at Wichita, Kansas, and for other purposes."

Defendant pleaded not guilty, was put upon his trial, October 5, 1891, and on the eighth of that month was found

guilty as charged, the jury having retired on the seventh to consider their verdict. Motions for a new trial and in arrest of judgment were severally made and overruled, and Mattox sentenced to death. This writ of error was thereupon sued out.

* * * * *

In support of his motion for new trial the defendant offered the affidavits of two of the jurors that the bailiff who had charge of the jury in the case after the cause had been heard and submitted, "and while they were deliberating of their verdict," "in the presence and hearing of the jurors or a part of them, speaking of the case, said 'After you fellows get through with this case it will be tried again down there. Thompson has poison in a bottle that them fellows tried to give him.' And at another time, in the presence and hearing of said jury or a part of them, referring to the defendant, Clyde Mattox said: 'This is the third fellow he has killed.' " The affidavit of another juror to the same effect in respect of the remark of the bailiff as to Thompson was also offered, and in addition, the affidavits of eight of the jurors, including the three just mentioned, "that after said cause had been submitted to the jury, and while the jury were deliberating of their verdict, and before they had agreed upon a verdict in the case, a certain newspaper printed and published in the city of Wichita, Kansas, known as The Wichita Daily Eagle, of the date of Thursday morning, October 8, 1891, was introduced into the jury room; that said paper contained a comment upon the case under consideration by said jury, and that said comment upon said case so under consideration by said jury, was read to the jury in their presence and hearing; that the comment so read to said jury is found upon the fifth page of said paper, and in the third column of said page, and is as follows:

* * * * *

MR. CHIEF JUSTICE FULLER, after stating the case, delivered the opinion of the court.

The allowance or refusal of a new trial rests in the sound discretion of the court to which the application is addressed, and the result cannot be made the subject of review by writ of error, *Henderson v. Moore*, 5 Cranch, 11; *Newcomb v. Wood*, 97 U. S. 581; but in the case at bar the

District Court excluded the affidavits, and, in passing upon the motion, did not exercise any discretion in respect of the matters stated therein. Due exception was taken and the question of admissibility thereby preserved.

It will be perceived that the jurors did not state what influence, if any, the communication of the bailiff and the reading of the newspaper had upon them but confined their statements to what was said by the one and read from the other.

In *United States v. Reid*, 12 How. 361, 366, affidavits of two jurors were offered in evidence to establish the reading of a newspaper report of the evidence which had been given in the case under trial, but both deposed that it had no influence on their verdict. Mr. Chief Justice Taney, delivering the opinion of the court, said: "The first branch of the second point presents the question whether the affidavits of jurors impeaching their verdict ought to be received. It would, perhaps, hardly be safe to lay down any general rule upon this subject. Unquestionably such evidence ought always to be received with great caution. But cases might arise in which it would be impossible to refuse them without violating the plainest principles of justice. It is, however, unnecessary to lay down any rule in this case, or examine the decisions referred to in the argument. Because we are of opinion that the facts proved by the jurors, if proved by unquestioned testimony, would be no ground for a new trial. There was nothing in the newspapers calculated to influence their decision, and both of them swear that these papers had not the slightest influence on their verdict." The opinion thus indicates that public policy which forbids the reception of the affidavits, depositions or sworn statements of jurors to impeach their verdicts, may in the interest of justice create an exception to its own rule, while, at the same time, the necessity of great caution in the use of such evidence is enforced.

There is, however, a recognized distinction between what may and what may not be established by the testimony of jurors to set aside a verdict.

This distinction is thus put by Mr. Justice Brewer, speaking for the Supreme Court of Kansas in *Perry v. Bailey*, 12 Kans. 539, 545: "Public policy forbids that a matter resting in the personal consciousness of one juror

should be received to overthrow the verdict, because being personal it is not accessible to other testimony; it gives to the secret thought of one the power to disturb the expressed conclusions of twelve; its tendency is to produce bad faith on the part of a minority, to induce an apparent acquiescence with the purpose of subsequent dissent; to induce tampering with individual jurors subsequent to the verdict. But as to overt acts, they are accessible to the knowledge of all the jurors; if one affirms misconduct, the remaining eleven can deny; one cannot disturb the action of the twelve; it is useless to tamper with one, for the eleven may be heard. Under this view of the law the affidavits were properly received. They tended to prove something which did not essentially inhere in the verdict, an overt act, open to the knowledge of all the jury, and not alone within the personal consciousness of one."

The subject was much considered by Mr. Justice Gray, then a member of the Supreme Judicial Court of Massachusetts, in *Woodward v. Leavitt*, 107 Mass. 453, where numerous authorities were referred to and applied, and the conclusions announced, "that on a motion for a new trial on the ground of bias on the part of one of the jurors, the evidence of jurors as to the motives and influences which affected their deliberations, is inadmissible either to impeach or to support the verdict. But a jurymen may testify to any facts bearing upon the question of the existence of any extraneous influence, although not as to how far that influence operated upon his mind. So a jurymen may testify in denial or explanation of acts or declarations outside of the jury room, where evidence of such acts has been given as ground for a new trial." See, also, *Ritchie v. Holbrook*, 7 S. & R. 458; *Chews v. Driver*, 1 Cox (N. J.), 166; *Nelms v. Mississippi*, 13 Sm. & Marsh. 500; *Hawkins v. New Orleans Printing Co.*, 29 La. Ann. 134, 140; *Whitney v. Whitman*, 5 Mass. 405; *Hix v. Drury*, 5 Pick. 296.

We regard the rule thus laid down as conformable to right reason and sustained by the weight of authority. These affidavits were within the rule, and being material their exclusion constitutes reversible error. A brief examination will demonstrate their materiality.

* * * * *

The judgment is reversed, and the cause remanded to

the District Court of the United States for the District of Kansas, with a direction to grant a new trial.

WOLFGRAM V. TOWN OF SCHOEPKE.

Supreme Court of Wisconsin. 1904.

123 Wisconsin, 19.

Action for personal injuries from a hole in a country highway, left by the town authorities in original construction by merely covering the same with poles. Special verdict of twenty questions returned by jury, finding all material facts in favor of the plaintiff except that question No. 16, "Was plaintiff guilty of any want of ordinary care which contributed to injury he received?" was answered "Yes." Plaintiff produced affidavits of all twelve jurors to the effect that all the jurors agreed that plaintiff was not guilty of any want of ordinary care, and that the insertion of the answer "Yes" instead of the word "No" was a mistake. The foreman, agreeing with these facts, states that he intended to write answer to the sixteenth question so as to find that said plaintiff was not guilty of any want of ordinary care which contributed to his injury. Upon these affidavits the plaintiff moved, first, that the answer "Yes" to the sixteenth question be stricken out, and the answer "No" be inserted in lieu thereof, and for judgment upon the verdict as so amended, basing the request also on the contention that there was no evidence to sustain the affirmative answer to that question. That motion was denied, from which denial the plaintiff appeals.

Thereupon plaintiff moved on minutes and said affidavits for a new trial. Defendant moved to strike out jurors' affidavits. The court entered its order reciting that the motion was based on a mistake in the verdict and on the lack of support from evidence, whereby it denied defendant's motion to strike out said affidavits, "excepting that said affidavits be received and considered only as tending to show that there was a mistrial by reason of a mistake by the jury in writing the answer to question No. 16,"

but rejecting said affidavits in as far as they "tend, generally, to impeach or contradict said special verdict." The court entered further order granting plaintiff's motion to set aside the verdict and awarding a new trial, no costs being imposed on either party. From that order the defendant appeals.

DODGE, J. * * *

* * * * *

It is, however, probably true that the new trial was granted because the court was convinced by the jurors' affidavits that the written verdict did not express the conclusion of the jury, and that the peril of injustice from entry of judgment for defendant was so great that, in exercise of the discretion vested in him, a new trial ought to be had. This view presents the question whether the affidavits of jurors could be received as evidence of the facts they state. The general rule is very ancient, and often reiterated, that the statements of the jurors will not be received to establish their own misconduct or to impeach their verdict. *Edmister v. Garrison*, 18 Wis. 594, 603. An excellent collection and analysis of decided cases will be found in *Woodward v. Leavitt*, 107 Mass. 453. From this it appears that the early idea was that of secrecy in their deliberations, and, further, the impropriety of receiving jurors' statements as to their mental processes, whether to impeach or support their verdict. This rule, in its application, has been subjected to much of refinement and qualification by different courts, involving conflict of *dicta* and of actual decision which it would not be profitable to review in detail nor possible to harmonize. The necessity of some limitation to the general rule against receiving statements of the jurors is declared in *McBean v. State*, 83 Wis. 206, 209, 53 N. W. 497. In some cases the rule is limited to things which transpire in the jury room or in court, but it will be found in most of those cases also limited to matters involved in reaching the verdict. This limitation was recognized and applied in *Hempton v. State*, 111 Wis. 127, 145, 86 N. W. 596; *Roman v. State*, 41 Wis. 312; *Schissler v. State*, 122 Wis. 365, 99 N. W. 593; *Pepercorn v. Black River Falls*, 89 Wis. 38, 41, 61 N. W. 79; *Mattox v. U. S.*, 146 U. S. 140, 13 Sup. Ct. 50. In line with the same idea are a number of decisions drawing a distinc-

tion between the proceedings involved in reaching and agreeing upon the verdict and the mere act of expressing it, either orally or in writing. The following cases recognize such distinction, and hold that the reasons excluding jurors' testimony as to their conduct in the former stage do not exclude their evidence as to what really was the verdict agreed on in order to prove that it has not been correctly expressed, through mistake or otherwise: *Cogan v. Ebdon*, 1 Burrows, 383; *Roberts v. Hughes*, 7 Mees. & W. 399; *Little v. Larrabee*, 2 Greenl. 37; *Weston v. Gilmore*, 63 Me. 493; *Peters v. Fogarty*, 55 N. J. Law, 386, 26 Atl. 855; *Jackson v. Dickenson*, 15 Johns. 309; *Dalrymple v. Williams*, 63 N. Y. 361; *Hodgkins v. Mead*, 119 N. Y. 166, 23 N. E. 559; *Capen v. Stoughton*, 16 Gray, 364; *Pelzer Mfg. Co. v. Hamburg-B. F. Ins. Co.*, 71 Fed. 830. Several of these cases were cited with approval of this very distinction in *McBean v. State*, *supra*. Against their doctrine we find *Polhemus v. Heiman*, 50 Cal. 438; *Murphy v. Murphy*, 1 S. Dak. 316, 47 N. W. 142, and *McKinley v. First Nat. Bank*, 118 Ind. 375, 21 N. E. 36. Of these, the first two seem to be controlled by local statutes, and are therefore not persuasive. The Indiana case, however, squarely denies the admissibility of jurors' testimony to prove that the written answer to a special question was the reverse of the agreement in fact reached. This view is based on the rule that jurors cannot "impeach their own verdict." But is it an attempt to impeach their own verdict? That depends on the sense in which that word is used. Is the written paper filed, or the agreement which the jury reach, the verdict? We think the latter is what is intended when we say the jurors cannot impeach it. The former, like most records or writings, is but the expression or evidence of some mental conception. Hence it may well be said that a showing that such writing is not correct is not impeachment of the verdict itself. The repudiation of written expressions, when, by mistake, they fail to express the intention or mental concept, is familiar in the law. A writing is not a contract when it fails to express that on which the minds of the parties met, and courts freely exercise power to correct mistakes when the proof leaves no doubt that the real contract was something else. That which decides the rights of parties litigant is the

unanimous agreement of the jurors. Each party is entitled to such judgment as results from that agreement. Any other is presumptively unjust, and any rule that necessitates it is unreasonable, unless supported by considerations of public policy, or of such danger from opening the door to investigation that wrong is likely to be done oftener than the right promoted. We are persuaded that the reasons which should exclude a juror from showing that he made a mistake in reaching his conclusion (see *Murdock v. Sumner*, 22 Pick. 156) do not extend to a showing that the words used in conveying it to the court, or enrolling it on the records, by mistake of the person uttering or writing them, fail to express the conclusions reached by all the jurymen. Of course, the showing of the latter fact must be clear beyond peradventure; at least to warrant a change in the written verdict and final judgment thereon. If the slightest doubt lurks in the mind of the court, he should confine relief to the granting of a new trial, which, of course, he may always order when there is reasonable cause to believe that the judgment will do injustice. Some courts incline to the view that a new trial is the only relief after the jury have separated. *Little v. Larrabee*, *supra*; *Weston v. Gilmore*, 63 Me. 493. But the clear weight of authority is that, upon sufficiently clear showing of the mistake, and of what was the verdict agreed on and intended to be expressed, the court may substitute a true expression for the incorrect one, and enter judgment accordingly. See *Cogan v. Ebdon*, *supra*; *Peters v. Fogarty*, *supra*; *Dalrymple v. Williams*, *supra*; *Hodgkins v. Mead*, *supra*; *Pelzer Mfg. Co. v. Hamburg-B. F. Ins. Co.*, *supra*.

We conclude, therefore, that the trial court properly received and considered the affidavits of the jurors in this case; that they at least sufficed to satisfy the court of great danger of injustice being done by entry of judgment in accordance with the written verdict, and therefore justified him in exercising his discretion to relieve plaintiff from the predicament in which he stood by awarding him another trial. Whether such affidavits made so plain a case as to entitle plaintiff to correction of the verdict and judgment in his favor is a question not open to plaintiff on this appeal. Plaintiff might probably have raised it had

he refrained from motion for new trial and appealed from a judgment in defendant's favor. When, however, he made the latter motion, he appealed to the court's discretion to relieve him from the adverse situation which, while not due to his fault or mistake, was due neither to any misconduct of the jury nor error of the court. He had no absolute right to such relief, but merely to have the court exercise a judicial discretion whether it ought to be accorded him. The situation does not fall within any of those where it is held proper to grant the relief without terms, under the authorities on the subject above cited. We are brought to the conclusion, therefore, that the court committed no error in awarding new trial; but, whether it was granted because the verdict, as filed, was against the weight of evidence or was impugned by the affidavits of the jurors, error was committed in failing to impose reasonable terms as a condition. What those terms should be is a subject for consideration primarily by the trial court.

By the Court.—Plaintiff's appeal is dismissed. Upon defendant's appeal the order is reversed, and cause remanded with directions to embody in the order granting new trial the payment of reasonable terms by plaintiff as a condition.

CHAPTER XVIII.

TRIAL AND FINDINGS BY THE COURT.

FOWLER V. TOWLE.

Supreme Judicial Court of New Hampshire. 1870.

49 New Hampshire, 507.

This was a writ of error, brought by Cyrus Fowler and others against Elias Towle. The writ of error is dated October 1, 1869.

The original action was replevin, for a meeting-house bell, in favor of Towle, against Fowler and others. The plea was *non cepit*, with a brief statement, giving notice of title to the bell in the defendants and others. By consent of the parties, the action was tried by the court at Freedom, after the adjournment of the May term, 1868. Neither party requested the court to report the facts found, nor the conclusions of law upon them. At the close of the trial, the cause was reserved for consideration upon written arguments, and the finding of the court was subsequently filed in the clerk's office. The finding, after giving a description of the action, concludes as follows:

“The case was well tried, and the evidence and law were well argued by the respective counsel engaged, in writing. The court, after a mature examination and consideration of the facts and evidence, and the law applicable thereto, has come to the conclusion, that the said Elias Towle recover of said defendants one dollar, for his alleged damages for the alleged caption and detention of said bell mentioned in his declaration; and also that plaintiff be restricted to the recovery of one dollar in full of all costs whatsoever in this suit. G. W. N., Jus. &c.

“The finding of the court is also upon the further limitation and condition, that if the defendants shall undertake either by transfer of the action to the full court or otherwise, to delay immediate judgment according to the aforesaid finding of the court, then the plaintiff by way of

penalty, shall be allowed to recover the whole amount of his legal costs from the beginning, and also if the plaintiff shall attempt to transfer this action as aforesaid or otherwise disturb the aforesaid finding of the court, then, in such case, the court orders that, by way of penalty, the aforesaid finding shall be wholly reversed and annulled, and that the said defendants recover as damages against said plaintiff the value of the bell, being three hundred dollars, with interest from the 5th day of July, A. D. 1867, and full costs of court.

G. W. N., Jus. &c.

“The action on the docket having been continued *nisi* judgment is therefore ordered as of the last term for plaintiff for one dollar debt, and one dollar costs, and the clerk will enter it up accordingly.

G. W. N., Jus. &c.”

* * * * *

In the assignment of errors in this case the plaintiffs in error pray that “the judgments aforesaid may be reversed and held for nothing, and that they may be restored to all things they have lost by reason thereof.”

* * * * *

The defendant in error moved to quash the writ of error upon its return into court, and the parties agreed that “pleas may be filed and argued without prejudice to defendant’s motion to quash in the same brief in which said motion is argued.” No plea has been furnished, and the defendant in error relies solely upon his motion to quash.

* * * * *

SARGENT, J. The first ground taken by defendant in error, on his motion to quash is, that in this class of cases, error does not lie. That the proceeding being entirely by force of special statute, is not a proceeding according to the course of the common law, and therefore that *certiorari* should have been the form of proceeding instead of error.

What are the statute provisions applicable to this case? Secs. 1 and 2 of chap. 189, Genl. Stats., prescribe the jurisdiction of this court at the law terms, while sec. 3 does the same at the trial terms, as follows: “At the trial terms they shall take cognizance of civil actions and pleas, real, personal and mixed, according to the course of the common law,” etc. Sec. 4 then provides that “in civil actions

the court shall try the facts in controversy and assess the damages, if the parties so elect, and judgment rendered on such trial shall be conclusive as if rendered on the verdict of a jury;" and sec. 5 provides that "the decision of the court in such case, shall be in writing, if either party so requests, stating the facts found and the conclusions of law upon them, which shall be filed and recorded, and either party may except to any ruling or decision of the court in matters of law in the same manner and with like effect, as upon a trial by jury."

Now the question is, whether the substitution of the court for the jury, to settle the questions of facts, by agreement of parties, so far changes the nature of the whole proceeding, that it is no longer "a civil action or plea" prosecuted "according to the course of the common law?" The writ is the same; the service the same; the entry in the court the same; the defendant's appearance the same; the pleadings the same; the issue joined is the same; and, after verdict, the judgment must be the same; and shall have the same effect, as though rendered upon a verdict of the jury; and provision is made, that either party requesting it, shall have the decision in writing, and may except to any ruling or decision of the court in matters of law, in the same manner, and with the same effect, as upon a trial by jury.

When all these facts are considered, and also the fact that it is only by agreement of the parties, that this change can be made, and that all the proceedings, both before and after trial, are to be the same in both cases, we are satisfied that this arrangement of the parties as to the trier of the facts, does not change the nature of the proceeding any more than it does the form, and was not designed to change either.

It is a sufficient answer to this suggestion, that if by this agreement of the parties, and this trial of the facts by the court instead of a jury, the proceeding is changed so as to be no longer a "civil action or plea according to the course of the common law," then the court at the trial term would no longer have jurisdiction of the case, because it clearly does not come under any of the other heads enumerated in sec. 3, and unless it continues to be what it was when it was commenced, viz., a civil action or plea ac-

cording to the course of the common law, the court would cease to have jurisdiction of the same at the trial term, because it is only as such an action or plea, that the court at that term has any jurisdiction of the case. This position of the defendant in error is not well taken.

A writ of error would be the proper remedy in a case tried by the court, under secs. 4 and 5 in all cases, where it would be the remedy if the same case had been tried by the jury, instead of the court. The court was substituted for the jury in this case, to try the facts, by express agreement of the parties; but while the court thus settles the questions of fact, in the capacity of a jury, still the judge retains all his powers as judge in questions of law, and may exercise the same discretion in allowing or limiting costs, that he might before, so that while acting as a jury, to try the facts, he has no power over the costs, either to allow or disallow, or limit, yet as judge, he may pass upon the question of costs.

And while the judge who thus acts in the double capacity of judge and jury has, and may exercise all the powers both of the judge and jury, still he has no powers in addition to those which the court and jury have in any ordinary case. Having premised thus much, in relation to the powers and duties of the judge, who acts as judge and jury both, in the trial of a cause, let us look at the verdict in this case, and see how much of it is a finding upon questions of fact, and what part of it is simply a ruling upon questions of law, or the exercise of the discretion vested in the court.

So far, as the limiting of the original plaintiff's costs is concerned, that was a matter within the discretion of the court, as a court, and had nothing to do with the finding of the facts, and no exception would lie to the ruling of the court, upon a matter like this, which is placed by law in the discretion of the court, and it seems equally well settled, that a writ of error will not lie in such a case. *Rochester v. Roberts*, 29 N. H. 360, 368.

To this part of the verdict, then, there could be no exception, and there was no error. And if there had been error in this, the plaintiffs in review being the original defendants, would hardly insist upon having that corrected, and being compelled to pay full costs, instead of

the limited amount fixed by the judge who tried this cause. That is not one of the errors assigned in this case.

The other part of the verdict (omitting now the conditional portions of it) is "that said Towle recover of said Fowler & als. one dollar as damages for the caption and detention of said bell mentioned in his declaration." As there was no request to state in writing either the facts found, or the conclusions of law upon the facts in the case, by either side, we think this finding is plain, intelligible and explicit enough, to answer the requirements of the law.

In order to reach that conclusion, the facts found must have been, that the bell in question belonged to Towle, and as he had taken the bell into his possession upon the replevin writ, all he could recover would be the damages for the wrongful taking and detention of it, and that is, what he does recover by this verdict and judgment. This is such a finding that judgment may be properly rendered upon it.

* * * * *

Let us next consider the remaining or conditional portion of the verdict in this case. It will be observed, that the finding of the court is in three separate and distinct parts; the first and third relate to the same subject-matter; the first, the finding of one dollar damages and the limiting the costs to one dollar; the third, ordering a judgment on that finding, according to its terms. These, too, are consistent with each other, and are perfect in themselves, and each is signed separately, and neither of them contains anything, as matter of fact, which the presiding judge might not properly find, acting in place of a jury, or as matter of law, which the same judge acting as court, might not properly do and order.

But the second or conditional part of the verdict is all inconsistent with the other findings, it is all conditional, not upon the law or facts of the case, but upon the future conduct of the parties, and was intended to be held over both parties, as it would seem, *in terrorem*, in order to induce them to abide by the first award, and submit to the judgment, which was ordered thereon. This portion of the verdict is entirely separate from all the rest, and is signed separately.

Whence did the presiding judge, who tried this cause, derive his power to make orders as to the future conduct of these parties? The power to deprive them of rights which the law had given them, the power to punish them for resorting to those remedies which the law has provided for all good citizens? He could not derive this power from the agreement of the parties, because this agreement was simply, that the court should act in the place of the jury in finding the facts in the case, and gave the court no additional powers as a court. After that agreement, the presiding judge, had just the powers he had before as presiding judge, and in addition, the power and authority to find the facts in the case, upon legal testimony, and that was all.

A jury may mistake their province, and undertake to find something, that was not in issue, but such part or parts of their verdict would be rejected as surplusage, and only such part as was confined to the issue raised by the pleadings, could stand as a verdict. *Tucker v. Cochran*, 47 N. H. 54. So far, then, as he acted as a jury, the presiding judge, had no authority or power to undertake to regulate the future conduct of these parties, and so far the verdict can have no force or effect. While acting as judge, he had the power to limit costs, in his discretion, and to order judgment upon the verdict he had rendered, still he had no more power than he would have had if the jury had found the verdict upon the evidence. In such case, he would have the power to set aside the verdict if a proper case was made, or to order judgment upon it, or to continue the cause, but he had no power or jurisdiction to put the parties under bonds for good behavior, without the proper complaint on oath, nor had he the power to say that they should not avail themselves of all their legal rights and remedies, after the judgment which he might properly render, was entered up.

As a part of the verdict, upon the facts, this portion would be merely surplusage, and would all be rejected, and as an order of the court, or a part of the judgment, it was extra-judicial, was without authority, and without legal effect, a mere nullity, not *voidable* merely but absolutely void.

There is no doubt, therefore, that the second judgment

would be reversed, if the question were brought before the court at the proper time and in the proper way. But the question here is, whether a writ of error is the proper way to bring the matter before the court at this time. When this case was brought forward, and the new judgment was rendered, it was at a regular term of the court, when counsel were present, as it was their duty to be, and had every opportunity to take exceptions. All the objections existed then that exist now, and if the proper exceptions had been taken to the rulings and orders of the court at that time, the judgment must inevitably have been reversed. No reason or excuse is given or offered, or pretended to exist, why objection was not then made, and exception taken. * * *

Under these circumstances, the plaintiff's in error, having had ample opportunity to take any and all exceptions, seasonably, and have them considered just the same as upon a writ of error, and having neglected to take any such exceptions at the proper time, they cannot now * * * be heard to raise exception * * *

We find no ground, therefore, upon which this writ of error can be sustained, and are of opinion that the motion to quash the writ should be granted.

Writ quashed.

UTAH NATIONAL BANK OF SALT LAKE CITY V.
NELSON.

Supreme Court of Utah. 1910.

— *Utah*, —; 111 *Pacific*, 907.

Action by the Utah National Bank of Salt Lake City, Utah, against Joseph Nelson. From a judgment for plaintiff, defendant appeals. Affirmed.

Plaintiff, a corporation organized and existing under the laws of Congress, brought this action to recover from defendant upon a promissory note. The complaint alleges, in substance: That the defendant, on January 22, 1908, at Salt Lake City, Utah, for value received, executed and

delivered to plaintiff his certain promissory note, and thereby promised, on 30 days' demand after date, to pay to the order of plaintiff \$13,250, with interest at 6 per cent. per annum from date until paid, and to pay 10 per cent. additional as attorney's fee if the note should be placed in the hands of an attorney for collection; that payment of the note was demanded September 11, 1908, but the defendant refused to pay the same, or any part thereof; that the note was placed in the hands of attorneys for collection. The answer admitted each allegation in the complaint, with the exception that it denied that the note was given "for value received." The answer also contained the following affirmative allegation, namely; "That the promissory note signed by the defendant and delivered by him to the plaintiff, as alleged in said complaint, was without consideration, and that no consideration whatever passed or was given for the said promissory note; * * * that neither the plaintiff nor any other person ever paid any sum of money or any other thing, or ever suffered or received any detriment as a consideration for the signing and delivery of the said promissory note; and that said note was wholly without consideration." The case was tried to the court without a jury. * * *

The court, among other things, found, so far as material here: "That, for a valuable consideration received by defendant, he executed and delivered his promissory note (the note in question) to plaintiff; * * * that all of the allegations contained in plaintiff's complaint filed herein are true, and all the denials and allegations of said defendant in his answer are untrue, except as to the admissions therein contained." As a conclusion of law the court found that plaintiff was entitled to judgment against defendant for the principal of the note, \$13,250, and interest thereon amounting to \$1,104.16, and for attorney's fee amounting to \$1,325, and rendered judgment in favor of plaintiff for the sum of \$15,679.16 and costs of suit. To reverse the judgment defendant has brought the case to this court on appeal.

MCCARTY, J. (after stating the facts as above). Appellant, in his assignment of errors, alleges "that the court erred in that it failed to find the facts, if any there were, constituting, or which could constitute, any consideration

for the contract or promissory note," and insists that the finding made by the court, namely, "that for a valuable consideration received by said defendant he (the defendant) executed the promissory note mentioned," was a mere conclusion of law and not a finding of fact at all * * *

In Spelling, New Tr. & App. Pro. § 593, the author says; "If an issue be tendered in general terms and met by a denial in the same form, a finding in the same general form will be sufficient; but, where the pleadings are so framed that the controversy turns upon a particular fact, the finding should conform to the issue thus presented and be specific. Accordingly, when only general facts are averred, and the controversy related to the settlement of a long standing account consisting of numerous items, it was held that a general finding of a balance in favor of plaintiff was sufficient"—citing with approval the case of *Pratalongo v. Larco*, 47 Cal. 378. The action in that case was, as stated in the opinion, "for money lent and advanced and paid, laid out, and expended by the plaintiff to and for the use of the defendant and for money had and received by the defendant for the use of the plaintiff. The answer is a general denial and a counterclaim in which the defendant avers that the plaintiff is indebted to him for money had and received, lent and advanced, and paid, laid out, and expended." So in this case it is alleged in the answer, in general terms, that the note in question "was without consideration, and that no consideration whatever passed or was given for the promissory note." The general finding that the note was executed "for a valuable consideration received by said defendant" negatives the affirmative allegation of the answer and is therefore sufficient. Moreover, the authorities seem to hold that findings are sufficient when the facts found are stated in the same way as they are alleged in the pleadings.

In Hayne on New Trial, sec. 243, the rule is stated as follows: "Facts may be stated in the findings in the same way they are stated in the pleadings. It is not necessary that the findings should follow the precise language of the pleadings; but the only purpose of findings is to answer the questions put by the pleadings, and it seems to be the received idea that it is sufficient if the answers are given in the same language as the question, and that the

two modes of statement are governed by the same general rules."

In 8 Ency. Pl. & Pr. 939, it is said: "It is not necessary that the findings should be in the exact language of the pleadings or in any particular form." The finding complained of in this case, while of course not in the exact language of that part of the answer in which want of consideration is alleged, nevertheless is directly responsive thereto. And, furthermore, the doctrine is elementary that the findings should be a statement of the ultimate facts in controversy and not of the evidentiary matters from which the ultimate facts are to be deduced or found. In 8 Ency. Pl. & Pr. 941, it is said: "The findings of the court should be statements of the ultimate facts only, and not probative facts * * * The findings should contain a concise statement of the several facts found by the court from the evidence and not the evidence from which they are found."

Murphy v. Bennett, 68 Cal. 528, 9 Pac. 738, was an action to recover damages for the tearing down of a barn and converting the materials thereof. It was alleged in the complaint that the plaintiff was the owner of the barn at the time of the alleged conversion. The answer denied the ownership of the plaintiff and set up two affirmative defenses in justification of the taking. The court found that the plaintiff was not, and that the defendant was, the owner of the building, but omitted to find on the affirmative defenses. It was contended that the finding was a conclusion of law. On appeal the Supreme Court held that the finding on the issue of ownership was sufficient, and that the failure to find on the affirmative defenses did not prejudice the plaintiff. In the course of the opinion the court said: "Here the allegation in the complaint is that the plaintiff 'was the owner of a certain frame building, situate,' etc. The answer denied that plaintiff was the owner of the building. Whether plaintiff did own the building or not was then the ultimate fact to be determined, and upon the issue thus raised the court found against the plaintiff. We think it clear that the findings referred to are findings of fact, and not conclusions of law."

In the case of *Kahn v. Central Smelting Co.*, 2 Utah, 371, it is said in the syllabus: "A finding 'that there was no

partnership between the plaintiff and the defendant, is not a conclusion of law, but is a finding of fact." And in the course of the opinion Mr. Justice Emerson, speaking for the court, says: "The fact that there was a partnership is the ultimate fact alleged in the complaint. There are certain facts and conditions and circumstances set out in the complaint from which this ultimate fact is deduced; that is, there is in the complaint much detail of mere evidentiary facts. The material issue of fact is, however: Was there a partnership? And the finding responds to this issue. This was the ultimate fact to be ascertained, and it is none the less a finding of fact because drawn as a conclusion from other facts." This case is cited with approval and the doctrine therein announced reaffirmed by this court in the case of *Snyder v. Emerson, Auditor*, 19 Utah, 319, 57 Pac. 300, wherein it is held that "the finding that W. F. Critchlow was duly appointed as night jailer is not a conclusion of law, but a finding of an ultimate fact which was an issue."

As a test for determining whether the finding in question is a conclusion of law or a finding of an ultimate fact, let us suppose, for example, that the court had, in the language of the defendant's answer, found "that the promissory note signed by defendant and delivered by him to the plaintiff, as alleged in said complaint, was without consideration, and that no consideration whatever ever passed or was given for the said promissory note." Could such a finding be successfully assailed on the ground that it is a conclusion of law and not a statement of an ultimate fact? Certainly not, because it is the only finding that the court could have made had it found on this issue in favor of the defendant, and that, too, notwithstanding this issue was presented by the affirmative allegations of defendant's answer and the burden was upon him to prove that the note was executed without consideration. Now, if a finding that the note was executed without consideration would be a sufficient finding to support a judgment in favor of defendant, it necessarily follows that a finding that the note was made and delivered "for a valuable consideration" is a sufficient finding to support a judgment for plaintiff. We are clearly of the opinion that the finding made by the court is a finding of an ultimate fact, and,

as we have stated, it is directly responsive to the affirmative allegations contained in the defendant's answer.

* * * * *

Judgment affirmed, with costs to respondent.

DARLING V. MILES.

Supreme Court of Oregon. 1911.

57 Oregon, 593.

This is an action by Thomas Darling against S. A. Miles to recover damages suffered by reason of the fraudulent representation made by defendant in the sale of certain lots.

The complaint alleges that on "the 20th day of July, 1906, the defendant herein did, with intent to cheat and defraud the plaintiff, falsely and fraudulently represent to the plaintiff that he was the absolute owner in fee, free from incumbrance, of lots six (6) and seven (7) in block five (5), in Pleasant View addition, * * * in the city of Portland, and that lot six (6) was 46.9 feet by 100 feet, * * * when in truth and in fact the defendant at that time was not, and well knew that he was not, the owner of the south fifteen (15) feet of said lot six (6) free from incumbrance, and plaintiff alleges that the public then had a right to use the said 15 feet as a highway, and the defendant then knew it; that plaintiff herein relied upon the truth of the statement of the defendant and believed the same, and on July 20, 1906, he did, by reason of such reliance and belief, purchase * * * and received from the defendant his warranty deed, wherein and whereby the grantors certified that the said premises were free from all encumbrances * * * ,"

All these allegations are denied by the answer, except that defendant admits the execution and delivery of the deed, with covenants and warranty, as alleged in the complaint.

The action was tried by the court without a jury. At

the close of the testimony the court made the following finding of facts:

"The court finds that on or about the 20th day of July, 1906, the plaintiff purchased from the defendant lots 6 and 7 in block 5, Pleasant View addition, Multnomah County, Oregon, for a valuable consideration, and received from the defendant a general warranty deed therefor. That the south 15 feet of said lot 6 is subject to a right of way of the public to use the same for a highway, and said sale was made without any fraud on the part of the defendant, and without any fraudulent representations in regard thereto."

Judgment was rendered thereon in defendant's favor, from which plaintiff appeals.

Reversed.

MR. JUSTICE EAKIN delivered the opinion of the court.

1. Plaintiff contends that the findings of fact do not support the judgment, and to this we agree. Section 158, B. & C. Comp., provides that when an action is tried by the court, without the intervention of a jury, the decision shall state the facts found, and such decision shall be entered in the journal, and judgment entered thereon accordingly. The finding that "the sale was made without * * * any fraudulent representations" only states a conclusion of law. To justify a conclusion to that effect it was necessary for the court to find whether or not defendant represented that he was the owner of the lot, free from incumbrance, and that its dimensions were as stated, with knowledge on defendant's part that the representations were false or were made recklessly as of his own knowledge, without any knowledge of their truth; and if the court finds that the representations were so made it must also find whether plaintiff relied thereon to his injury: *Cawston v. Sturgis*, 29 Or. 331 (43 Pac. 656). Finding adverse to plaintiff on at least one of these matters is necessary to support the conclusion that there were no fraudulent representation, or to support a judgment to that effect.

2. This court has held in many cases that findings of fact must be made on all material issues necessary to support the judgment. See *Wright v. Ramp*, 41 Or. 285 (68 Pac. 731); *Henderson v. Reynolds*, 57 Or. 186 (110 Pac. 979), and cases therein cited.

3. Counsel for defendant urges that the proof fails to establish the elements of fraudulent representations alleged, but the case is not before us upon the evidence. The only means we have of knowing what was proved is from the findings of fact which are silent as to the elements urged here.

4. It is said in *Drainage Dist. No. 4 v. Crow*. 20 Or. 536 (26 Pac. 846), after quoting from said Section 158, B. & C. Comp:

“The object of this statute was to enable the parties to have placed upon the record the facts upon which the right litigated depends as well as the conclusion of law. * * * The facts found are conclusive upon the appellate court, but the conclusions of law are reviewable here on appeal.”

The facts found must justify the conclusions of law. Otherwise, they are abstract statements and not conclusions.

* * * * *

The judgment is reversed and remanded for a new trial.

Reversed.

MR. CHIEF JUSTICE MOORE did not sit in this case.

SLAYTON V. FELT.

Supreme Court of Washington. 1905.

40 Washington, 1.

Crow, J.—This action was commenced by appellant, Charles J. Slayton, against respondent, D. W. Felt, to recover a broker's commission on the sale of real estate in the city of Seattle. Upon the trial before the court without a jury, appellant presented findings of fact in his favor, which the court declined to make. Judgment was entered dismissing the action. * * *

* * * * *

(2) Appellant also contends that the trial court erred in failing to make findings of fact and conclusions of law, separately stated, or at all, and asks that the judgment be

reversed by reason thereof. Appellant urges that under Bal. Code, Sec. 5029, it was the duty of the trial court to make findings of fact and conclusions of law, separately stated. Respondent contends that, as the final judgment was one of dismissal, findings of fact were unnecessary, citing, *Thorne v. Joy*, 15 Wash. 83, 45 Pac. 642, and *Noyes v. King County*, 18 Wash. 417, 51 Pac. 1052. Both of said cases were actions in equity. This court has heretofore announced the rule that findings of fact and conclusions of law are not necessary in equitable actions, but we are not aware of any such announcement being made as to actions at law. We see no reason why findings of fact and conclusions of law are not just as essential, if properly requested, in an action at law when the same is dismissed, as where an affirmative judgment is entered. This being an action at law, the cases cited by respondent do not sustain his contention. The question then arises whether the action of the trial court in failing to make findings of fact and conclusions of law amounted to such prejudicial error as would entitle appellant to a reversal. In *Wilson v. Aberdeen*, 25 Wash. 614, 66 Pac. 95, this court said:

“We come now to the consideration of the appellants’ contention that the judgment must be reversed because of the failure of the trial court to make findings of fact and conclusions of law. Our statute provides that ‘upon the trial of an issue of fact by the court, its decisions shall be given in writing and filed with the clerk. In giving the decision, the facts found and the conclusions of law shall be separately stated. Judgment upon the decision shall be entered accordingly.’ Bal. Code § 5029; 2 Hill’s Code, § 379. This provision of the code is in form mandatory, and this court has several times held, in effect, that in actions at law tried by the court without a jury, findings of fact and conclusions of law are necessary to support the judgment. See, *Bard v. Kleeb*, 1 Wash. 370, 25 Pac. 467; *Kilroy v. Mitchell*, 2 Wash. 407, 26 Pac. 865; *King County v. Hill*, 1 Wash. 404, 25 Pac. 451; *Sadler v. Niesz*, 5 Wash. 182, 31 Pac. 630. 1030; *Potwin v. Blasher*, 9 Wash. 460, 37 Pac. 712. But in more recent cases it has been decided that a judgment will not be reversed on appeal for want of findings of fact and conclusions of law, where it is not made to appear by the record that there was any request

for such findings and conclusions, or any objection raised upon that account. *Washington Rock Plaster Co. v. Johnson*, 10 Wash. 445, 39 Pac. 115; *Remington v. Price*, 13 Wash. 76, 42 Pac. 527."

It is true that appellant did request the trial court to make findings of fact in favor of himself, upon the issues raised by the pleadings, the same being claimed by him to be warranted by the evidence admitted. The court, not thinking the evidence warranted such findings, refused to sign the same. It does not appear, however, that appellant at any time requested the court to make such findings of fact and conclusions of law as it might determine to be proper or warranted by the evidence. We think this request should have been made, before appellant would be entitled to base a successful assignment of error upon the refusal of the court to make any findings whatever. The findings requested by appellant are shown in the record, and afford him an opportunity, of which he has availed himself, to assign error upon the refusal of the trial court to make the same. He has been deprived of no legal or valuable right in that direction. This court in *Bard v. Kleebe*, 1 Wash. 370, 25 Pac. 467, 27 Pac. 273, construing said Bal. Code, § 5029, there mentioned as § 246, said:

"As we regard it, § 246 is for the protection of court and parties. To the court it gives an opportunity to place upon record its view of the facts and the law in definite written form, sufficiently at large that there may be no mistake. To parties it furnishes the means of having their causes reviewed, in many instances, without great expense."

The only privilege of which the appellant has been deprived, if any, has been to bring an appeal to this court without a statement of facts based upon such findings as the court would have signed if requested, but which, necessarily, would have been against appellant upon the issues joined. Such an appeal could not have benefited appellant in any manner whatever. In view of this fact, and, also, the further fact that appellant failed to request the court to make findings in accordance with its view of the evidence, we think no error prejudicial to appellant has been committed. In an action at law, either party has the right to request a trial court to make such findings of fact as

it may deem proper, upon all the issues involved, or upon any particular issue, which such party may deem material or important, and such findings should then be made. A mere request, however, to make certain findings in favor of such party only, is not in itself sufficient. Of course, it is the proper and correct practice for a party to request findings in his own favor, to which he may think himself entitled, so that he may make proper exceptions to their refusal. But such findings in his favor having been refused and excepted to, he must, if he desires to assign error on a failure to make any findings or conclusions whatever, also request the court to make such findings as it thinks the evidence warrants. This was not done by appellant in this action.

We find no prejudicial error in the record. The judgment is affirmed.

MOUNT, C. J., ROOT and HADLEY, JJ., concur.

FULLERTON and DUNBAR, JJ., concur in the result.

GRAHAM V. STATE, EX REL. BOARD OF COMMISSIONERS.

Supreme Court of Indiana. 1879.

66 Indiana, 386.

WORDEN, C. J.—This was an action by the appellee, against the appellant, which resulted in a trial by the court, and a finding and judgment for the plaintiff, for the sum of two thousand dollars.

The action was brought against Graham, as a surety on the official bond of Rufus Gale, as the auditor of Jefferson county. The bond was in the usual form of such bonds, but was in the penalty of five thousand dollars. Breaches of the bond were assigned, alleging, among other things, that Gale, during his term of office, had, as such auditor, drawn numerous warrants or orders upon the county treasury, payable to himself, for large amounts, and had presented them to the treasurer for redemption, who had paid the amount thereof to said Gale in redemption thereof; that

the orders were drawn without any order of the board of commissioners of the county, or authority of law.

* * * * *

The defendant filed a motion for a *venire de novo*, because the facts were not sufficiently found. And it is said in the brief of counsel for the appellant, that "The failure of the court to find one way or the other, upon the facts, as to two of the breaches alleged in the complaint, leaves the issues as to those breaches untried, just as the verdict of a jury on one paragraph of a complaint consisting of several paragraphs leaves the issues on the other paragraphs untried, and in such a case a *venire de novo* is awarded."

This makes it necessary to consider to some extent the nature and office of a special verdict or finding.

The statute provides that "A special verdict is that by which the jury find the facts only, leaving the judgment thereon to the court." 2 R. S. 1876, p. 171, sec. 335. The next following section provides that "the court shall, at the request of either party, direct them" (the jury) "to give a special verdict in writing upon all or any of the issues."

By section 341, 2 R. S. 1876, p. 174, it is provided that upon trials of questions of fact by the court, if one of the parties request it, "the court shall first state the facts in writing, and then the conclusions of the law upon them."

There is no difference between a special verdict and a special finding by the court, except that the special verdict finds the facts only, and the court afterward pronounces, or rather applies the law to the facts found, and renders judgment accordingly; while, in a special finding, the court states the conclusions of law upon the facts found, so that the parties can except to the conclusions. Neither a special verdict nor a special finding can do more in relation to facts than to find or state them. But what facts are to be thus found or stated? Clearly those that are proved upon the trial, and none other. When the special verdict has found the facts proved on the trial, it has performed its entire office; and when the special finding has stated the facts proved on the trial, it has performed its entire office, so far as the facts are concerned.

Of course the facts may be proved by circumstances or otherwise, as in any other mode of trial.

But suppose there are issues in the cause concerning which no evidence is given. There is nothing in such case in relation to those issues for the court or jury, in finding specially, to pass upon. No fact in relation to them has been proved, and, hence, no fact in relation to them is to be found or stated, because, as we have seen, the special verdict or finding is confined to the facts proved.

In the case supposed, it would seem that, in rendering judgment, the issues concerning which no facts are found should be regarded as not proved by the party on whom the burden of the issue or issues lies.

* * * * *

The judgment below is affirmed, with costs.

CITY OF OWNESBORO V. WEIR.

Court of Appeals of Kentucky. 1893.

95 Kentucky, 158.

JUDGE HAZELRIGG delivered the opinion of the court.

The question involved in this appeal is the liability of the appellant, City of Owensboro, for the fee of the appellees—attorneys at law—for services rendered by them at the employment of the mayor of the appellant acting without the authority of the city council.

The circumstances of the employment are set forth in an “agreed case” and in the record in which the services were rendered.

* * * * *

But, say the appellees with earnestness, there was no statement by the court of its conclusions of fact found, separately from its conclusions of law.

Section 332 of the Civil Code provides that “upon trials of questions of fact by the court, it shall not be necessary for the court to state its findings, except generally for the plaintiff or defendant, unless one of the parties request it, with a view of excepting to the decision of the court upon

the questions of law involved in the trial; in which case, the court shall state in writing the conclusions of fact found, separately from the conclusions of law."

Now upon an agreed state of fact, what could the court do in the way of stating "in writing the conclusions of fact found separately from the conclusions of law?" Simply copy or re-state the agreed state of fact! Clearly the court's judgment on the law only was asked. There was no *trial* of questions of fact. The case of *Harris v. Ray*, 15 B. M. 629, cited by counsel, simply determined that the provisions of the Code regulating applications for a new trial applied to judgments by default. It has no bearing on the section quoted.

* * * * *

GAINES & COMPANY V. WHYTE GROCERY COMPANY.

Kansas City Court of Appeals. 1904.

107 Missouri Appeal, 507.

SMITH, P. J.—The plaintiff and defendant are both business corporations, the former organized under the statute of this State and the latter under that of the State of Kentucky. The plaintiff in its petition alleged, (1), that it was and is the owner of a special trade-mark for "Old Crow" whiskey, which defendant had infringed and was infringing; and (2), that by the use of the words "Old Crow" upon bottles containing whiskey other than the genuine "Old Crow" whiskey produced by plaintiff which it offered to the trade, defendant thereby carried on such unfair trade and competition as entitled plaintiff to the injunctive process of the court. The defendant's answer, in addition to a general denial, interposed the defenses of laches and the statute of limitation. There was a trial and decree for plaintiff and defendant appealed.

* * * * *

The defendant's final contention is, that the trial court erred in its refusal to make special finding of the facts

and conclusions of law thereon. The statute (section 695) doubtless applies to both legal and equitable actions, but while this is so, we do not think the failure to make a special finding in an action of the latter kind constitutes a reversible error, because the supervisory courts are authorized on appeal to try and determine such actions upon the pleadings and evidence *de novo*. The findings of the trial court, if any, may be entirely disregarded by the former tribunal and such findings and decree entered therein as seems to it to be meet and proper. The Legislature did not, by the enactment of the statute already referred to, intend to abrogate the well and long-established practice of the appellate courts in supervising the findings of trial courts in equity cases, or to deprive the former of the jurisdiction to determine for themselves the correctness of the findings of the latter. *Blount v. Spratt*, 113 Mo. 48; *McElroy v. Maxwell*, 101 Mo. 294; *Benne v. Schneccko*, 100 Mo. 250. If the supervisory courts are not bound by the findings of the trial courts, or their conclusions of law in equity cases, but may review the whole evidence and determine for themselves what the findings of fact and conclusions of law should be, it is difficult to see how a party could be prejudiced by the failure of the trial court to make special findings of fact, in such cases.

The failure, therefore, of the court in the present case to make special finding of facts was not such an error as requires a reversal of the decree; and especially so since it was, as we think, clearly for the right party and the only one that could have been given in the cause.

Accordingly, our conclusion is that the decree should be affirmed. All concur.

CITY OF BUFFALO V. DELAWARE, LACKAWANNA
& WESTERN RAILROAD COMPANY.*Court of Appeals of New York. 1907.**190 New York, 84.*

The object of this action was to secure a judicial determination that a portion of the river front in the city of Buffalo is a public street and to compel the defendant to remove certain obstructions therefrom. The main issue raised by the answer was whether the *locus in quo*, called Front street, was a public street when the action was commenced. * * *

The trial justice found the following facts, among others: * * *

“*Eighteenth.* That said dock and wharf from the time of its erection down to the commencement of this action, and since, has been open to travel by vehicles and pedestrians, except when such travel was temporarily obstructed by freight stored upon said dock or wharf, and the said dock or wharf has been used during the said times by vehicles and pedestrians, more largely by the latter than the former; that the greater number of persons using said dock or wharf for foot or vehicle traffic did so for the purpose of reaching the stores and warehouses abutting on said wharf, and for the purpose of delivering supplies to the vessels lying thereat, or receiving passengers from such vessels, or transacting other business with said vessels. But it is equally true that many of the people using said dock and wharf, both for foot and vehicle traffic, used the same as a way of communication between Main street and points east of Washington street, and that many pedestrians constantly used said dock and wharf who had no business with the abutting stores and warehouses, or the vessels lying at said dock.”

After finding the facts as thus stated the trial court found the following, which were designated as “conclusions of law:”

* * * * *

“*Third:* That for a period of six years and more prior to the commencement of this action the said premises

herein designated as 'Front street,' ceased to be traveled or used as a public highway, and ceased to be a highway for any purpose.

* * * * *

VANN, J. The trial court rendered judgment against the plaintiff on the theory that, although Front street became a public highway as early as 1826 through tender of dedication by the owners and acceptance by the municipal authorities, still it had ceased to be a public highway because it had not been traveled or used as such for a period of more than six years prior to the commencement of the action. While facts were found which sustain the conclusion of law that Front street became a public highway through offer and acceptance, no finding of fact, classified as such, was made that the street had not been traveled or used as a public highway for the statutory period required to effect an abandonment. (*City of Cohoes v. Delaware & Hudson Canal Co.*, 134 N. Y. 397; *Matter of Hunter*, 163 N. Y. 542, 548; L. 1861, ch. 311; L. 1890, ch. 568, § 99.)

It is claimed that the third conclusion of law contains the finding of fact needed to support the judgment and that, although it is classified as a conclusion of law, since it is really a finding of fact the same effect should be given to it as if it had been so designated in the decision.

The finding in question is one of fact or law. If it is the latter, the facts found do not support the judgment, because a street once in existence is presumed to continue until it ceases to be such owing to abandonment or some other lawful cause. (*Cohoes Case, supra.*) We think, however, that the finding, except the last clause thereof, is not one of law but of fact. The cessation of user and travel upon a street for the period prescribed involves a question of fact. Traveling upon a street is an act or a series of acts which can be seen and described. The use of a street for traveling purposes requires that something should be done thereon which is apparent to ordinary observation. One may travel on a street by walking, riding or driving. Each method involves action and an act is a fact, as that word is known to jurisprudence.

An error in the classification of findings by the trial court does not prevent an appellate court from classifying them for itself in accordance with their actual character.

Giving a wrong name to a finding does not change its nature and if it is placed under the head of "conclusions of law," when it is a finding of fact, it will be treated on appeal as what it really is, at least for the purpose of upholding a judgment. (*Berger v. Varrelmann*, 127 N. Y. 281, 288; *Christopher & Tenth Street R. R. Co. v. Twenty-third Street R. R. Co.*, 149 N. Y. 51, 57.) As we have already seen, the judgment appealed from cannot stand unless the finding under consideration is a finding of fact, and it now remains to be seen whether it can stand even on that theory, since it is claimed that such finding of fact is inconsistent with other findings of fact, and hence must yield thereto at the election of the appellant in aid of his exceptions. It was upon this ground that one of the learned justices below based his dissent.

What is the situation according to the findings when properly classified? About 1826 a public highway existed on the river front between Washington and Main streets. It still existed in 1838, when a dock was built by the abutting owners over and upon the land owned by them constituting said highway, covering it for its entire width and length. From that time to this the abutting owners have used the dock for dock purposes and the general public have used it for highway purposes, neither use excluding the other altogether, although doubtless interfering with it to some extent. Under these circumstances what became of the street when the dock was built? Can abutting owners destroy a street in this way? Did the construction of the dock annihilate the highway? There is no statute which gives it that effect, and according to the common law the street leaped from the ground to the dock and staid there. It is there now unless it has been abandoned by nonuser as we read the authorities. * * *

* * * * *

When a private dock is built over a public street upon the shore of navigable waters, the dock becomes part of the street and the public has a right to travel over it. Ownership of the dock is not inconsistent with the existence of the street any more than ownership of the land over which the street extended. Assuming that the defendant or its predecessors could lawfully build a dock over their own land in order to reach the river, still, as their land was

subject to the right of the public to travel upon it, they could not unreasonably interfere with that right nor with the existence of the street which was the foundation thereof. Two rights co-existed. The defendant, as owner of the river front, had the right to reach the water. As there was a street along the river front over the defendant's land the public had the right to use the street. The building of the dock changed neither right. Both continued to exist, although under changed conditions. They met but did not merge, nor did either destroy the other. The defendant had the right to use its dock, as a private dock, subject to the right of the public to travel over it, as they had previously traveled upon the land over which it was built. The city had no right to use the dock for dock purposes, but its citizens had the right to use it for street purposes. While the street followed the dock, and covered the whole of it, that did not authorize the city to collect wharfage; and although the dock was private property the same as the land beneath it, that did not authorize the defendant to prevent the public from using it for the same purpose that they had previously used the land. The easement for travel still existed, but it was over the dock which took the place of the land constituting the street. The public had the right to travel in the same place and in the same direction that they had before, but instead of traveling upon the surface of the land, they were obliged to travel and had the right to travel upon the structure that the defendant had placed on the land. That structure became a street for the purpose of travel and a private dock for use as such, with a superior right in the public in case of conflict through reasonable use of the respective rights.

* * * * *

We have thus laid down the law applicable to the facts as found independent of the fact appearing in the third conclusion of law. It is clear that the latter, treated as a finding of fact that Front street had not been traveled or used as a public highway for more than six years, is inconsistent with the eighteenth finding of fact that the public used the dock continuously from the time it was built, both for foot and vehicle traffic, as a way of communication between Main street and points east of Washington street. The learned trial justice evidently regarded the street as

no longer in existence after the dock was built, and hence found that travel had ceased upon the street, although he found that it continued upon the dock which took the place of the street. He may thus have been misled into making the inconsistent findings.

“While an appellate court should harmonize inconsistent findings when it is possible to do so, if they prove irreconcilable it is the duty of the court to accept those most favorable to the appellant, and he is entitled to rely upon them in aid of his exceptions.” (*Israel v. Manhattan Ry. Co.*, 158 N. Y. 624, 631; *Nickell v. Tracy*, 184 N. Y. 386, 390.) The finding that the street has been abandoned cannot be reconciled, according to our view of the law, with the finding that the dock has been used and traveled upon continuously as a street. We are, therefore, compelled to reject the former and to accept the latter, with the same force and effect as if it was the only finding upon the subject appearing in the decision. This leaves the conclusion of law that the defendant is entitled to the exclusive use, possession and occupancy of Front street, and that the plaintiff is not possessed of any right, title or interest therein, without any finding to support it. The exception to this conclusion of law, as well as to the direction for judgment against the plaintiff, raised reversible error and requires us to reverse the judgment appealed from and to order a new trial, with costs to abide the event.

CULLEN, Ch. J., GRAY, O'BRIEN, WERNER, WILLARD BARTLETT and CHASE, JJ., concur.

Judgment reversed, Etc.

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